

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR PETITIONER AND JOINT APPENDIX

IN THE

United States Court of Appeals

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT *For the*

District of Columbia Circuit

No. 11,137

FILED OCT 31 1951

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*

v.

CLERK

DISTRICT OF COLUMBIA, *Respondent.*

No. 11,145

DISTRICT OF COLUMBIA, *Petitioner*

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent.*

**Petition for Review of Decision of the Board of Tax
Appeals for the District of Columbia.**

JAMES C. MCKAY

JAMES E. CARR

Attorneys for Petitioner

701 Union Trust Building,
Washington 5, D. C.

COVINGTON & BURLING
Of Counsel

QUESTIONS PRESENTED.

1. Did the Board of Tax Appeals err in holding that it lacked jurisdiction of an appeal from a deficiency assessment where checks in the amount of the tax together with the letter of protest were delivered to an examiner in the Assessor's office of the District before the petition for review was filed with the Board of Tax Appeals, where the record shows that representatives of the Assessor's office customarily received checks from taxpayers in payment of income taxes, and where the notice of assessment was not stamped "paid" until the day following the filing of the petition for review with the Board of Tax Appeals?

2. Did the Board of Tax Appeals err in holding that petitioner's refund claim was not finally denied by a statement in a letter from the Assessor proposing tax adjustments where the denial was based on such proposed adjustments and where the petitioner was given 30 days in which to protest the adjustments?

3. Did the Board of Tax Appeals err in holding that respondent's cross petition was timely filed when it was placed under the door of the office of the Board of Tax Appeals after the usual closing hour of the office on the last day on which a notice of appeal could be filed and where the cross petition was found the following morning on the floor of the office by a cleaning woman?

4. Did the Board of Tax Appeals err in holding that petitioner did not have income taxable under the District of Columbia Income and Franchise Tax Act for the year 1948?

INDEX.

	Page
Questions Presented.	
Statement of the Case	1
Summary of Argument	9
Argument	11
I. a. The Board of Tax Appeals erred in holding that it lacked jurisdiction of the appeal from the deficiency assessment	11
b. The doctrine of equitable estoppel is appli- cable to the facts in this case	18
II. The Board of Tax Appeals did not err in holding that the appeal to the Board was within ninety days from the denial of the re- fund claim	21
III. The Board of Tax Appeals erred in holding that the placing of the cross-petition under the door of the business office of the Board of Tax Appeals after the close of business on May 31, 1951, constituted filing	22
IV. The Board of Tax Appeals did not err in holding that appellant did not have income taxable under the District of Columbia Fran- chise & Income Tax Act for the year 1948..	24
Conclusion	27

TABLE OF CITATIONS.

CASES:

Aktiebolaget Separator, 45 B. T. A. 243 (1941)....	26
Angier Corp., 17 B. T. A. 1376 (1929)	22
Bilbrey v. Chicago Daily News, 57 F. Supp. 579 (D. C. 1944)	26
Casaldue v. Diaz, 117 F. 2d 915, 917 (1st Cir. 1941), cert. denied 314 U. S. 639	24
Chambers v. Lucas, 59 App. D. C. 327, 328; 41 F. 2d 299 (1930)	23

	Page
City of Los Angeles v. Los Angeles County, et al., 72 P. 2d 138 (1937)	18
District of Columbia v. McFall, 188 F. 2d 991 (1951)	8, 17
Estate of Charles Schmalstig, 43 B. T. A. 433, 438 (1941)	22
Haas v. Henkel, 216 U. S. 462, 480 (1910)	16
Heinemann Chemical Co. v. Heiner, 92 F. 2d 344, 346 (3rd Cir. 1937)	21
Layne v. Tribune Co., 63 App. D. C. 213, 71 F. 2d 223 (1934)	26
Lewis-Hall Iron Workers v. Commissioner, 57 App. D. C. 364, 366; 23 F. 2d 972 (1928), cert. denied, 277 U. S. 592	22, 23
Lindner v. District of Columbia, 32 A. 2d 540 (1943)	12
McCord v. Commissioner of Internal Revenue, 74 App. D. C. 369; 123 F. 2d 164 (1941)	23
Mohawk Glove Corp., 2 B. T. A. 1247 (1925)	22
Mueller Brass Co. v. Alexander Milburn Co., 80 U. S. App. D. C. 274; 152 F. 2d 142 (1945)	26, 27
Murtaugh Highway Dist. v. Twin Falls Highway Dist., 142 P. 2d 579 (1943)	19
Neely v. Philadelphia Inquirer Co., 61 App. D. C. 334, 62 F. 2d 873 (1932)	26
Otis Elevator Co., B. T. A. Docket No. 694 (p. 22) ..	22
Rynex v. District of Columbia, 114 F. 2d 842 (1940) ..	12
State of Michigan v. Jackson L. & S. R. Co., 69 Fed. 116 (6th Cir. 1895)	19
Trustees of Schools v. Village of Cahokia, 192 N. E. 565 (1934)	19
United States v. Barnsdall Oil Co., 127 F. 2d 1019 (10th Cir. 1942)	17
United States v. Birdsall, 233 U. S. 223 (1914)	16
United States v. Haas, 163 Fed. 908 (S. D. N. Y. 1908)	17
United States v. MacDaniel, 7 Pet. 1, 13, 14 (1833) ..	16, 17
United States v. Newport News Shipbuilding & Drydock Co., 178 Fed. 194 (4th Cir. 1910)	17
Vestal v. Commissioner, 152 F. 2d 132, 80 U. S. App. D. C. 264 (1945)	20
Wayne Body Corp., 22 B. T. A. 401, 412 (1931)	22

Index Continued.

iii

Page

West v. United States, 58 App. D. C. 329, 30 F. 2d 739 (1929)	17
Whitney v. United States, 99 F. 2d 327 (10th Cir. 1938)	17
Wilkes v. United States, 139 Fed. 409 (M. D. Ala. 1905)	17

STATUTES:

District of Columbia Code (1940) as amended, § 47-2403	10, 11
District of Columbia Code (1940) as amended, § 47-1586	13
District of Columbia Code (1940) as amended, § 47-1589c(b)	15
District of Columbia Code (1940) § 47-1580	24
District of Columbia Code (1940), § 47-1551 to 47-1551c	25
District of Columbia Code (1940) § 47-1551c(h), as amended by the Act of May 3, 1948	25

MISCELLANEOUS:

75 Cong. Reg. 5243 (April 11, 1938)	12
19 Am. Jur. Estoppel § 168	18
Senate Report No. 1042, 80th Cong., 2nd Sess., March 31, 1948	25

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,137

OWENS-ILLINOIS GLASS COMPANY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

No. 11,145

DISTRICT OF COLUMBIA, *Petitioner,*

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent.*

**Petition for Review of Decision of the Board of Tax
Appeals for the District of Columbia.**

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

The principal facts in this case prior to the assessment notice of June 30, 1950, issued by the Assessor of the District of Columbia against the petitioner for franchise tax for the taxable year 1948, and which the petitioner believes are correct, are contained in the first 12 of the 14 "Find-

ings of Fact'' filed by the Board of Tax Appeals on January 12, 1951, and are as follows:

"1. During 1948 and prior thereto petitioner, Owens-Illinois Glass Company, was an Ohio corporation, engaged in the manufacture and sale of glass containers. Its principal place of business was in Toledo, Ohio.

2. In 1942 it had opened an office in the District of Columbia in premises at 1627 K Street. In 1948 that office was part of the administrative division of petitioner. The function of the administrative division was the handling of legal matters and all matters relating to petitioner's activities other than manufacturing and sales.

3. The function of the K Street office was to keep the administrative division in Toledo informed on the introduction and progress of all bills in Congress which, in the judgment of the manager of the Washington office, would have some effect on the operation of petitioner's activities; reporting on the regulations of the Treasury Department as they affected taxes and affected petitioner's business, the regulations of the United States Food and Drug Administration that affected the packing of food products and the style and shapes of bottles and jars; and keeping in contact with the Alcohol Tax Unit Division of the Treasury in the way of getting permission to manufacture bottles of different designs and cases of different designs. Petitioner's Washington office also gathered the daily reports of the Department of Agriculture pertaining to crops, because that, to a certain extent, permitted petitioner to anticipate the demand for glassware. The office also kept petitioner's main office informed on labor regulations as they applied to women. It received news releases from a press service over a teletype in its office, and maintained a teletype for communication with petitioner's principal office. It also picked up regulations and bills and special documents or releases. The Staff of the office was composed of its manager, his secretary, a stenographer, and another employee whose duty it was to keep the Toledo office informed on labor regulations as they applied to

women. Petitioner made no sales to the United States Government by means of, or through, its Washington office.

4. None of the personnel of the Washington office performed any duties in connection with sale of goods shipped into the District; did not receive, retain or distribute price lists relating to petitioner's products. It did have catalogs in the office descriptive of the items manufactured by petitioner, but no price lists. The Washington office did not distribute these catalogs to customers or prospective customers in the District, and it did not receive, retain, or distribute information with respect to shipping date of petitioner's products, nor display samples of the products.

5. During 1948 petitioner made sales of glass containers and caps for bottles to customers in the District, amounting to \$794,867.12. Of these sales, \$201,241.04 were made by petitioner's selling personnel who worked out of its Philadelphia sales office, and \$593,626.08 were made by its selling personnel who worked out of its Baltimore sales office. The orders for these sales were solicited either personally in the District, or by mail.

Occasionally various members of petitioner's Baltimore office when they were in Washington, visited the District office of petitioner. These calls were of a social nature, and the Washington office was not used for the purpose of making sales, although on occasion the selling personnel may have used its telephone for the purpose of calling up their District customers and making engagements for personal interviews, having for their object the selling of petitioner's products. They occasionally called petitioner's Baltimore office from the Washington office.

6. At no time during 1948 did petitioner have a warehouse in the District, nor did it warehouse any of its products therein.

7. Petitioner's Washington office received inquiries with respect to its products, which it referred to its Baltimore office or to the Atlantic Glass Company.

8. The Washington office of petitioner consisted of nine rooms, which were used for the personnel of that office, a stationery room, a storage room, a teletype room and a room reserved for visitors from the legal division of petitioner who came to Washington for hearings before the Federal Trade Commission, with regard to tax matters or with regard to the National Labor Relations Board, and one room was occupied by a representative of the American Structural Products Company, a wholly owned subsidiary of petitioner, which manufactured glass blocks. Petitioner's Washington office had telephones, and its name was listed in the Washington telephone directory, both in the alphabetical section and, under the classification 'Glass' in the classified section.

9. During 1948 Petitioner sold and shipped directly to customers in the District of Columbia from outside the District, merchandise in the amount of \$794,867.12, which was .3693% of its total sales both within and without the District. On April 15, 1949 petitioner filed with the Assessor for the District, a so-called tentative return, which gave no information about petitioner or its business, except its name and address. That return was accompanied by petitioner's check for \$1,000 which was thereafter paid by the drawee bank.

10. Thereafter petitioner filed its District of Columbia franchise-tax return for 1948. This return showed no tax liability.

11. On August 5, 1949 petitioner filed a claim for refund of the \$1,000 paid with its so-called tentative return, upon the ground that the so-called tentative return and the payment had been erroneously made.

12. On March 20, 1950 the Assessor addressed and sent to petitioner the following communication:

'REGISTERED LETTER
RETURN RECEIPT REQUESTED

March 20, 1950
Re: File #9103

Owens-Illinois Glass Co.
Ohio Building
Toledo, Ohio
Gentlemen:

The examination by this office of your income and/or franchise tax return(s) for the year(s) ended December 31, 1948 indicates that the adjustment of your tax liability, as shown in the accompanying statement, is warranted.

IF YOU AGREE to the adjustment in tax as shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Interest will cease, as of date of assessment, upon payment of amount due to the Collector of Taxes, D. C., within ten (10) days from date of assessment.

IF YOU DO NOT AGREE to the proposed adjustment, you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency in tax against you.

Should you fail to file either the enclosed form of waiver or a written protest with this office within the thirty-day period mentioned, final determination of your tax liability will be made and notice and demand will be sent you in accordance with the provisions of law applicable to the assessment and collection of income and/or franchise tax deficiencies.

Yours very truly,

C. A. Beard, Jr.
Administrator
Income and Franchise Tax Division

Enclosures:
Statement
Form of Waiver

OWENS-ILLINOIS GLASS CO.
OHIO BUILDING
TOLEDO, OHIO

Calendar Year 1948

Net taxable, income per form D-20.....	\$18,392,617.60
Less: Interest	\$ 135,211.34
Rents	346,785.91
Royalties	63,383.51
Other Income*	1,197,495.10
	<u>1,742,875.86</u>
Net taxable income subject to apportionment factor	16,649,741.74
x Revised D. C. apportionment factors**	.003693
	<u>61,487.49</u>
Revised D. C. net taxable income.....	3,074.37
Tax at 5%	None
Less amount reported.....	
	<u>\$3,074.37</u>
Deficiency	

* Exclusive of purchase discounts, totalling \$463,867.29, which constitute reduction of "cost of goods sold".

** Computation of revised D. C. apportionment factor:

A. Total net sales within and without the District of Columbia, per Form D-20	\$215,214,612.34
B. All sales of goods shipped into the District of Columbia, to the United States, the District of Columbia or others, per sales schedule submitted with your letter dated August 3, 1949	794,867.12
C. Revised D. C. apportionment factor (B÷A)	.003693

It is the opinion of this office that the above computation reflects the income which is fairly attributable to business carried on within the District of Columbia.

Based on the foregoing, you are advised that your claim for refund on tentative tax paid in the amount of \$1,000.00 is herewith disallowed.' '' (Jt. App. 7-12)

On or about June 30, 1950 the Assessor's office sent an assessment notice to the petitioner, showing a total tax for the year 1948 of \$3,074.37, and interest due in the amount of \$150.39. A credit of \$1,000 was shown on the notice with a total payment due listed as \$2,231.65. (Jt. App. 105)

A letter protesting the assessed taxes and checks covering the taxes and interest due in the amount of \$2,231.65 were delivered in the middle of the afternoon of July 19, 1950 in person by the attorney for the petitioner to the examiner in the Assessor's office who had been participating in discussions of the proposed assessment with the petitioner. (Jt. App. 75-77) This was seventy days prior to the end of the ninety-day period in which the petitioner could appeal. The examiner accepted the checks and the protest letter in payment of the tax due. (Jt. App. 76, 79, 109) Additional interest on the deficiency was owing because the assessment was not paid within the ten-day grace period. (Jt. App. 74) The running of interest on the assessment stopped when the checks were delivered to the Assessor's office, in accordance with the practice of that office. (Jt. App. 79) It is the practice of the Assessor's office to accept checks made in payment of taxes, and Mrs. Arth, the bookkeeper in the Assessor's office, testified that she had occasion to take checks which she had received from taxpayers to the Collector's office "practically every day." (Jt. App. 91)

No witness recalled whether the checks were delivered to the Collector's office on July 19 or July 20. (Jt. App. 94) The Collector's office closed at 3:45 p.m. and the Assessor's office at 4:45 p.m. (Jt. App. 81) Checks and notices of assessment delivered to the Collector's office after 3:45 p.m. are stamped with the following day's date. (Jt. App. 88) In the Collector's office the bill was stamped "Jul-20-50 \$2,231.65. Paid . . . Guy H. Pearson, Collector of Taxes, D. C." (Jt. App. 105) The bill and checks were stamped "Paid under Protest" (Jt. App. 105-107)

On July 19, 1950 after the attorney for the petitioner had delivered the protest letter and checks to the examiner in the Assessor's office he went to the office of the Board of Tax Appeals and filed the petition. (Jt. App. 77)

The Board of Tax Appeals held on January 12, 1951,

"1. That the deficiency assessment of income and franchise tax against petitioner, Owens-Illinois Glass Company, in the amount of \$2,074.37 and interest thereon in the amount of \$157.28, a total of \$2,231.65, be, and it is hereby canceled, and that said petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from July 20, 1950 until the date of refund.

2. That the action of the Assessor in disallowing petitioner's claim for refund of income and franchise tax for 1948, in the amount of \$1,000 be, and it is hereby, reversed, and that said petitioner is entitled to a refund of said sum." (Jt. App. 16, 17)

The respondent filed on January 19, 1951 motions to vacate the decision of January 12, 1951, on the grounds that (1) "\$1,000 of the tax was voluntarily paid . . .", (2) "... The appeal was not filed until July 19, 1950 . . . which is more than ninety days from the date of the denial of the claim for refund", and (3) "The deficiency assessment of tax was not paid until July 20, 1950 . . . after the appeal was filed . . ." (Jt. App. 17, Record 19, 22)

Respondent's motions of January 19, 1951 were overruled by an order of the Board of Tax Appeals filed February 2, 1951. (Jt. App. 18)

The Board of Tax Appeals vacated its decision of January 12, 1951 on February 23, 1951 in view of the decision of the United States Court of Appeals for the District of Columbia Circuit of February 23, 1951 in the case of *District of Columbia v. McFall*, 188 F. 2d 991 (1951), and ordered further proceedings on March 7, 1951. (Jt. App. 19) That case held that the Board of Tax Appeals lacked jurisdiction to hear an appeal where the payment of a District of Columbia excise tax was made four days prior to the filing of the petition but the protest letter was filed eight days after the filing of the petition.

After additional testimony was taken on March 7, 1951 with reference to the payment of the deficiency, the Board of Tax Appeals held on April 30, 1951 (1) that the petitioner was entitled to a refund of \$1,000, and (2) the Board

was without jurisdiction as to the appeal from the deficiency of \$2,074.37 and the interest thereon. (Jt. App. 21, 22)

On May 31, 1951, the last day of the allowable period for filing an appeal, the petitioner filed its petition for review by the United States Court of Appeals for the District of Columbia Circuit. (Jt. App. 22) After the office of the Board of Tax Appeals had closed on May 31, 1951 the respondent placed a cross-petition under the door of that office. (Jt. App. 98, 99)

The usual closing time of the office of the Board of Tax Appeals is 4:45 p.m. (Jt. App. 102) One of the attorneys for the respondent called the Clerk of the Board of Tax Appeals at her home about 6:30 p.m. on May 31, 1951, and said he had placed the cross-petition under the door of the Board of Tax Appeals' office. (Jt. App. 103)

The woman who was in charge of the cleaning of the Board of Tax Appeals' office found the cross-petition on the floor inside the door between 3 a.m. and 4 a.m. on June 1, 1951. (Jt. App. 100, 101)

The respondent's cross-petition was found by the Clerk of the Board of Tax Appeals on a desk in the office on the morning of June 1, 1951, and she marked it as having been filed on June 1, 1951, one day after the time in which an appeal could be taken. (Jt. App. 103, 104) Respondent's motion to correct the filing date of the cross-petition to May 31, 1951 was granted by the Board of Tax Appeals in its order filed June 28, 1951. (Jt. App. 27)

SUMMARY OF ARGUMENT.

1. The petitioner received a notice of assessment dated June 30, 1950 for franchise and income taxes. On July 19, 1950 petitioner's attorney delivered a protest letter and checks in payment of the assessment to the examiner in the Assessor's office who had been participating in conferences with the petitioner. The examiner accepted the protest letter and checks and considered they had been tendered in payment of the assessment. After delivering the protest

letter and checks to the Assessor's office the attorney for petitioner then filed with the Board of Tax Appeals a petition for review.

On the basis of these facts it is clear that the payment of the tax due was made before the petition was filed, within the meaning of Section 47-2403 of the District of Columbia Code (1940). The Assessor is by the statute required to administer the franchise and income tax. As a matter of practical administration the Assessor's office accepts checks in payment of taxes and upon receipt of checks that office stops the running of additional interest. The public relies on this practice.

2. Petitioner's refund claim was not denied until June 30, 1950, when a final determination was made by the respondent in the form of the assessment notice. Petitioner appealed on July 19, 1950 from that final determination, well within the ninety-day period in which an appeal could be taken.

The letter of March 20, 1950 in which respondent claims the refund claim was denied was a 30-day letter, granting appellant the right to protest the proposed franchise tax adjustment. The so-called denial was specifically "based on the foregoing" which was a proposed adjustment of taxes subject to petitioner's right of protest. It is well settled that a 30-day letter is not a final determination.

3. Respondent's cross-petition was placed under the door of the office of the Board of Tax Appeals after the usual closing hour of the office. It was found by the cleaning woman the morning following the day on which an appeal could be taken and did not reach the custody of the clerk of the Board of Tax Appeals until later that morning. The cross-petition was, therefore, not filed in time.

The respondent's cross-petition was not timely filed because it was not placed in the custody of a proper official before the end of the last day on which an appeal could be taken. The Court of Appeals has held that a document is not filed until it is placed in the custody of the proper of-

ficial. The respondent's cross-petition should, therefore, be dismissed for lack of jurisdiction.

4. Petitioner's sales in the District of Columbia during 1948 were made by salesmen who lived outside the District and who worked from the Baltimore and Philadelphia offices of petitioner. Petitioner's office in the District was solely a liaison office for collecting information and data to be transmitted to the home office which was in Toledo, Ohio. This office was not a sales office.

Petitioner was not, therefore, doing business in the District of Columbia within the meaning of those words as used in the statute. Accordingly, petitioner had no income from District of Columbia sources during 1948 and the Board of Tax Appeals properly held it was not subject to the District of Columbia Income and Franchise Tax.

ARGUMENT.

I.

a. The Board of Tax Appeals Erred in Holding That It Lacked Jurisdiction of the Appeal from the Deficiency Assessment.

Petitioner first paid the tax before appealing to the Board within the meaning of Section 47-2403 of the Code.

Section 47-2403 of the District of Columbia Code (1940) provides for an appeal to the Board of Tax Appeals by a person aggrieved by assessment of District taxes,

“provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing.”

The legislative history of this provision shows clearly that the purpose and intent of Congress in passing this legislation was to provide that the District of Columbia should not have to wait a long time for the tax money in the event that the Board of Tax Appeals should hold that

an assessment was properly made. Representative Nichols of Oklahoma who was serving on the Committee on the District of Columbia explained this provision in the proposed District of Columbia Revenue Act of 1937 on the floor of the House. He stated:

“If a taxpayer in the District of Columbia now wants to protest the payment of his tax, he has to do a thing which, in reality, is impossible. He has to enjoin the District of Columbia from collecting a tax which they have levied. . . . Now, we simply provide that if there is anything wrong with his tax, under protest he pays the tax, of course, and then goes to the Board of Tax Appeals or Tax Review for his redress, if any he has, and if it is adjudged that the tax be refunded, of course, it is refunded. If not, the District of Columbia has had the use of the tax instead of having to wait 2 or 3 or 4 years or something of that sort until the litigation is settled.” (75 Cong. Rec. 5243 (April 11, 1938)

The United States Court of Appeals for the District of Columbia in *Rynex v. District of Columbia*, 114 F. 2d 842 (1940), stressed the fact that payment of the tax must be made within the 90 day period before an appeal can be taken. The Court stated: (p. 844)

“... if it is sought to attack the assessment by appeal, the tax must be paid within ninety days after the receipt of the notice of assessment.” (114 F. 2nd 844)

Also see *Lindner v. District of Columbia*, 32 A. 2d 540 (1943).

Petitioner believes that the facts of the case, together with the existence of the practice of the Assessor's office to receive checks in payment of taxes for delivery to the Collector's office, as well as a consideration of the duties and functions of the Assessor's office impel the conclusion that petitioner, by delivering the checks to an authorized representative of the Assessor on July 19, 1950, fulfilled the requirements of Section 47-2403 of the Code.

Section 47-1586 of the District of Columbia Code (1940) provides,

“The Assessor is required to administer the provisions of this Article.”

The Article referred to is “Article I—Income and Franchise Tax.” It is the Assessor’s office which calculates the proper interest due, and when payments under protest are received by the Assessor’s office the running of interest stops. (Jt. App. 79, 92)

Mr. Morgan, the examiner in the Assessor’s office, testified as follows on this point:

“Q. Does this stamp, received July 19, 1950, Income Tax, have any significance other than the one you have just mentioned. A. Well, for our purposes it indicates the date that the letter or correspondence was received by our office. Q. Does it have any significance insofar as the running of interest is concerned? A. Yes, it does. Q. What is the significance, sir? A. We would not add interest after that date.” (Jt. App. 79)

The Assessor has by virtue of his wide administrative powers printed instructions directing that all income tax returns be filed with his office, and payments made with those returns on the last day on which they can be made are timely even though not filed with the Collector until a later date. (Jt. App. 92)

Mrs. Arth, the bookkeeper in the Assessor’s office, testified as follows:

“Q. Do you always take the check and bill to the Collector on the same day that you receive it in your office? A. No, sir.

Q. Is it or is it not unusual for you to hold it beyond the day that you receive it? A. It is not unusual. You could not possibly process the work that you would have passing over your desk in an actual day to day manner.

Q. Could more than one day go by? A. Yes.

Q. What would be the longest period of time? A. I couldn't say.

Q. Two or three days, maybe? A. It could possibly be two or three days.

The Board: . . . Suppose somebody came in on the 15th of April and wanted to pay an income tax and handed you a check and you knew that unless the check was paid that day there would be additional interest. There would be, wouldn't there?

The Witness: No, sir. If they came in to our office with a check and a bill and it was due on the 15th of April and we received it as of the 15th of April, we would not consider there would be any additional interest.

The Board: Would you tell the taxpayer that unless he took it up to the Collector's Office, on that very day, he would have to pay interest?

The Witness: No, sir.

The Board: You would receive payments, would you, both when it was necessary for an interest computation to be made as well as when it was not?

The Witness: Yes, sir." (Jt. App. 92)

Here, petitioner delivered the checks to an authorized agent of the Assessor's office who accepted them and considered that they had been tendered in payment of the notice of assessment. (Jt. App. 78, 79)

At the hearing before the Board of Tax Appeals Mr. Morgan, the examiner in the Assessor's office, testified in part as follows:

"Q. I show you this letter, Mr. Morgan, which has been introduced as petitioner's Exhibit 4 and ask you whether you have ever seen that letter before? A. I have.

Q. Tell me where you saw it and when, if you remember and under what circumstances. A. From the date shown on the letter indicating that our division received the letter on July 19; it appears that that was the date that I saw Mr. Carr and on that day Mr. Carr tendered payment for the deficiency in tax plus additional interest, which we discussed on the phone." (Jt. App. 79)

All of the previous transactions in connection with the payment of the tax had been with the Assessor's office. (Jt. App. 77) The delivery to the Assessor's representative of the checks stopped the running of interest. (Jt. App. 79)

Section 47-1589c (b) of the District of Columbia Code (1940), as amended, provides that,

“Deficiency—Where a deficiency, or any interest or additional amounts assessed in connection therewith under section 47-1589a or under section 47-1589b, or any addition to the tax in case of delinquency provided for in section 47-1589 is not paid in full within ten days from the date of assessment thereof, there shall be collected, as part of the tax, interest upon the unpaid amount at the rate of 6 per centum per annum from the date of such notice and demand *until it is paid*. . . .” [Emphasis supplied]

Accordingly, the Assessor's office upon receipt of the checks in payment of a tax due considers the amount paid, if the proper interest has been added.

It should also be noted that the “notice and demand” does not issue from the Collector's office but from the “Office of the Assessor”. (Jt. App. 105)

Because of the broad administrative authority vested in the Assessor by the statute it seems clear that the long standing practice of the Assessor's office in accepting checks in payment under protest and checks with returns is authorized, and the close relationship between the Assessor's office and that of the Collector requires such a practice. The public as is evidenced by the numerous checks delivered to the Assessor's office apparently believes that the practice is authorized. (Jt. App. 91) The Assessor's office obviously believes the practice is authorized, as is evidenced by the frequency with which it is followed. (Jt. App. 90, 91) The testimony of Mr. Morgan indicated that he was acting within his authority when he kept the checks and the letter of protest of petitioner's counsel. (Jt. App. 79)

Even the Collector of Taxes for the District of Columbia testified that it is proper for a check to be delivered to the Assessor in payment of taxes due. On this point he testified as follows:

“The Board: We are not talking about that kind of a case. We are talking about the kind of case where the Assessor has made the necessary computation and the tax is ready to be paid and then the question is, is it proper or is it unheard of, unusual, or customary under those circumstances for the check to be delivered to the Assessor.

The Witness: No; that is proper; that is done. I would say it is the exception. Those are special cases.

The Board: But not unheard of?

The Witness: Oh, no.” (Jt. App. 87)

Such practice is the construction that has been given to the law. The Supreme Court of the United States in an early case said that,

“... usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions.” [Emphasis supplied] See *United States v. MacDaniel*, 7 Pet. 1, 13, 14 (1833).

The underscored language was repeated by the Supreme Court in *Haas v. Henkel*, 216 U. S. 462, 480 (1910); and in *United States v. Birdsall*, 233 U. S. 223 (1914), wherein the Supreme Court also stated:

“... In numerous instances, duties not completely defined by written rules are clearly established to be settled practice, and action taken in the course of their performance must be regarded as within the provisions of the above-mentioned Statutes against bribery.” (233 U. S. at 231)

The ruling in the *MacDaniel* case was adhered to in *United States v. Barnsdall Oil Co.*, 127 F. 2d 1019 (10th Cir. 1942); *Whitney v. United States*, 99 F. 2d 327 (10th Cir. 1938); *West v. United States*, 58 App. D. C. 329, 30 F. 2d 739 (1929); *United States v. Newport News Shipbuilding & Drydock Co.*, 178 Fed. 194 (4th Cir. 1910); *United States v. Haas*, 163 Fed. 908 (S. D. N. Y. 1908); and *Wilkes v. United States*, 139 Fed. 409 (M. D. Ala. 1905).

The decision in the case of the *District of Columbia v. McFall*, 188 F. 2d 991, which led the Board of Tax Appeals to set aside its earlier decision for the petitioner, is distinguishable from the instant case in that the tax payment there made was a voluntary payment and not paid under protest. There was, therefore, a clear defect in a substantive matter. The tax was paid and four days later a petition was filed. The letter of protest was written four days after the petition was filed and was received eight days later. The Court properly held:

“As of the time when his petition was lodged with that Board, his payment of the tax was *voluntary*.”
[Emphasis supplied] (188 F. 2d at 993)

The tax must be paid under protest; it was not in that case.

In the instant case the payment was properly made under protest and delivered to the Assessor's representative before the petition was filed. It is believed, therefore, on the facts in this case and on the basis of the manner in which the law has long been administered in the District, that petitioner paid the tax under protest before the petition was filed.

If the Board of Tax Appeals were correct, a taxpayer who within the ninety-day period filed his petition first and then a few minutes later paid his tax would fail to meet the statutory requirement, even though both the filing of the petition and the payment were made well before the end of the ninety-day period. Certainly the jurisdiction of the Board of Tax Appeals for the District of Columbia does not depend upon any such formal requirement.

b. The Doctrine of Equitable Estoppel Is Applicable to the Facts in This Case.

Petitioner believes that the statute clearly authorized the action taken by the Assessor's office in the instant case. However, if the Court of Appeals for the District of Columbia Circuit should not agree, petitioner contends, in any event, that the doctrine of equitable estoppel must be invoked against the District of Columbia. The circumstances of this case are typical of those with respect to which courts, time and time again, have applied this doctrine.

Municipal corporations will be estopped by the exercise of governmental powers if justice and equity so require:

"... it [a municipality] may be estopped ... by the exercise of governmental powers, to prevent manifest injustice and wrongs to private persons where the restraint placed upon a municipality to accomplish that purpose does not interfere with the exercise of governmental powers of the municipality. A municipality is subject to the rules of estoppel in those cases wherein equity and justice require their application, and may be estopped under certain circumstances by its acts and conduct." (19 Am. Jur. Estoppel, § 168.)

The application of estoppel against respondent in the instant case would result in no interference with the exercise of the District's governmental powers, nor would the District be injured, bound, obligated or interfered with in any manner whatsoever. It must be plain to the respondent, as it is to petitioner, that the collection of taxes under circumstances such as these is inequitable and unjust.

There is, furthermore, ample support in the decisions for the application of the doctrine of estoppel in the instant case.

See, for example, *City of Los Angeles v. Los Angeles County, et al.*, 72 P. 2d 138 (1937), where the Supreme Court of California ruled that the City of Los Angeles was estopped to collect from the Los Angeles Railway Corpora-

tion a tax of two per cent on gross receipts which the City was entitled by statute to collect, because for years the railroad had followed the practice (which was known to the City) of paying the tax to the County.

In *State of Michigan v. Jackson, L. & S. R. Co.*, 69 Fed. 116 (6th Cir. 1895), the Court applied the doctrine of estoppel and in doing so said:

"It is a rule devised for the protection of the public that the state shall not be held responsible for the acts of its agent when done in excess of his powers. Assuming, for the moment, that there was an excess of power by the officers of the state, what is the application of the above-stated rule to the circumstances as we now find them? It is a fit rule to apply to a transgression which the state has not condoned; but it has no application to a case in which no question of morals is involved, but where a course of action has been pursued with the knowledge and acquiescence of the state in the management and disposition of its property interests for so long a time that the public have been led to reasonably believe that they may act upon the assumption that what has been done with the sanction of the state was validly accomplished. To apply the rule as the state asks us to apply it here would be to pervert it to an agency for mischief and wrong. . . ." (69 Fed. at 121)

Here, no question of morals is involved. Likewise, here, as in the above case, a course of action has been pursued with knowledge and acquiescence of officials of the District. The public has been led to believe that this course of action is valid and authorized.

Also see *Trustees of Schools v. Village of Cahokia*, 192 N. E. 565 (1934), and *Murtaugh Highway Dist. v. Twin Falls Highway Dist.*, 142 P. 2d 579 (1943). The latter court stated:

"We recognize that, as a general rule, the doctrine of estoppel does not apply to municipal corporations, and we are not unmindful of the fact that the courts of

many states have absolutely refused to apply it to such corporations. We are not prepared, however, to announce an unalterable and unexceptionable rule in this state, which would inevitably result in perpetrating wrong and injustice in exceptional cases like this. Courts of equity are established for the administration of justice in those peculiar cases where substantial justice cannot be administered under the express rules of law, and to adopt a rigid rule that recognizes no exceptions would be to rob such courts of much of their efficacy and power for administering even-handed justice. The people in their collective and sovereign capacity ought to observe the same rules and standard of honesty and fair dealing that is expected of a private citizen. In their collective and governmental capacity they should no more be allowed to lull the citizen to repose and confidence in what would otherwise be a false and erroneous position than should the private citizen." (142 P. 2d at 582.)

In *Vestal v. Commissioner*, 152 F. 2d 132, 80 U. S. App. D. C. 264 (1945), the United States Court of Appeals for the District of Columbia Circuit ruled that the Commissioner of Internal Revenue was estopped from asserting that the sale of real estate was by a corporation in dissolution after having earlier determined that the sale was by a partnership and collected taxes from the partners on such basis.

The Court said:

"The doctrine of election and estoppel must be applied with great caution to the Government and its officials. But in the proper circumstances it does apply." (80 U. S. App. D. C. at 268.)

The proper circumstances for the application of the principle of estoppel are present here. Petitioner asks only to be dealt with fairly, just as it would and does deal with respondent.

II.

The Board of Tax Appeals Did Not Err in Holding That the Appeal to the Board Was Within Ninety Days from the Denial of the Refund Claim.

The petition to the Board was filed July 19, 1950. (Jt. App. 2) The Board of Tax Appeals held that the refund claim was denied on June 30, 1950 when the Assessor made an assessment against petitioner in the amount of \$3,074.37 plus interest in the amount of \$150.39. (Jt. App. 18)

The respondent contends that the refund claim of the petitioner was included in a letter from the Administrator of the Income and Franchise Tax Division, dated March 20, 1950. That letter stated that the examination of petitioner's return for 1948 indicated that the adjustment of its tax liability as shown in the accompanying statement was warranted, and advising the petitioner that it could, within 30 days, protest against the proposed adjustment. (Jt. App. 112) The statement attached to that letter contained the following language:

“Based on the foregoing, you are advised that your claim for refund of tentative tax paid in the amount of \$1,000 is herewith disallowed.” (Jt. App. 114)

It will be seen that this was expressly based “on the foregoing”. The “foregoing” was a notice of intention to make an assessment, subject to right of protest, and was not a final action.

Until the notice of assessment of June 30, 1950, there was no final determination with respect to the petitioner's tax liability and accordingly no final determination with respect to petitioner's refund claim.

The letter of March 20, 1950 was a mere “proposed adjustment” of taxes and not a final determination. The law is well settled that a so-called 30 day letter is not a final determination, and an appeal cannot be taken from such a letter. *Heinemann Chemical Co. v. Heiner*, 92 F. 2d 344,

346 (3rd Cir. 1937); *Estate of Charles Schmalstig*, 43 B. T. A. 433, 438 (1941); *Wayne Body Corp.*, 22 B. T. A. 401, 412 (1931); *Angier Corp.*, 17 B. T. A. 1376 (1929); *Mohawk Glove Corp.*, 2 B. T. A. 1247 (1925).

The Board of Tax Appeals of the United States stated in *Wayne Body Corp.*, *supra*, that,

“We have held in a number of cases that an appeal from a 30 day letter (preliminary letter) does not give the Board jurisdiction. Only the final determination of a deficiency can give us jurisdiction.” (17 B. T. A. at 1384)

The letter of March 20, 1950 made only a tentative disallowance of the refund claim. The denial did not become final until the assessment notice of June 30, 1950. Congress certainly did not intend that a taxpayer should file two separate petitions, one based on the letter of March 20, 1950 and the other on the notice of June 30, 1950.

Since the refund claim was not finally denied until June 30, 1950, the appeal to the Board of Tax Appeals was within the ninety-day period allowed in which to appeal.

III.

The Board of Tax Appeals Erred in Holding That the Placing of the Cross-Petition Under the Door of the Business Office of the Board of Tax Appeals After the Close of Business on May 31, 1951, Constituted Filing.

The facts clearly indicate that respondent's petition for review should be dismissed for lack of jurisdiction.

The Board of Tax Appeals for the District of Columbia has previously stated that “. . . filing is the delivery of the document to the proper officials and the receipt and retention thereof by him.” *Otis Elevator Co.*, B. T. A. Docket No. 694 (p. 22).

The United States Court of Appeals for the District of Columbia Circuit stated in *Lewis-Hall Iron Works v. Com-*

missioner, 57 App. D. C. 364, 366; 23 F. 2d 972 (1928), *cert. denied*, 277 U. S. 592, that,

“... it is well established that in general a paper is not ‘filed’, within contemplation of law, until it is delivered to the proper officer to be filed by him... Filing a paper, in modern usage, consists of placing it in the custody of the proper official by the party charged with the duty, and the making of the proper indorsement by the officer.” (57 App. D. C. at 366)

In *Chambers v. Lucas*, 59 App. D. C. 327, 328; 41 F. 2d 299 (1930), the Court of Appeals for the District of Columbia noted that the “only question” considered in the *Lewis-Hall Iron Works* case, *supra*, “was the effect of filing a petition outside of the business hours of the board.” In the most recent decision by the Court of Appeals for the District of Columbia on this question, *McCord v. Commissioner of Internal Revenue*, 74 App. D. C. 369; 123 F. 2d 164 (1941), a copy of a telegraphic petition for review was placed in the custody of the Clerk of the Board at his home after office hours on the last day in which an appeal could be filed. The Court held on the facts in that case that the filing was timely, and stated:

“The Board cannot by rules or conduct limit the time or opportunity for filing given by statute. Moreover, the government operator [telegraphic], under the circumstances, *must be regarded as an agent of the Board with whom a telegraphic petition may be left for filing.* The petition was received by this agent within his regular office hours. That constitutes timely filing...” [Emphasis supplied] (123 F. 2d at 165)

The Board of Tax Appeals for the District of Columbia in the instant case attempts to distinguish the facts from the above cases on the ground that no rule had been published with respect to office hours and, accordingly, a petition placed in the office at any time prior to midnight of the last day was timely filed. (Jt. App. 26)

The evidence, however, shows clearly that the usual closing hour of the office is 4:45 p.m. (Jt. App. 102), and the Board recognized this in its opinion when it stated that the office "customarily closed at 4:45." (Jt. App. 26)

The test as to whether a document is filed is whether it is placed in the actual custody of the proper officer, and as stated in *Casaldue v. Diaz*, 117 F. 2d 915, 917 (1st Cir. 1941), *cert. denied*, 314 U. S. 639,

"A person wishing to file a notice of appeal after closing hours on the last day may seek out the clerk or deputy clerk or perhaps the judge . . . and deliver the notice to him out of hours."

In the instant case a cleaning woman found the cross-petition on the floor of the office of the Board of Tax Appeals on the morning of the day following the last day in which an appeal could be filed, and it did not reach the custody of a proper official until later that day. (Jt. App. 100, 103) As the cross-petition was not placed in the custody of a proper official prior to the end of the time in which an appeal could be taken it is believed the cross-petition was not timely filed. Accordingly, the petition for review filed by the appellee should be dismissed for lack of jurisdiction.

IV.

The Board of Tax Appeals Did Not Err in Holding That Petitioner Did Not Have Income Taxable Under the District of Columbia Franchise and Income Tax Act for the Year 1948.

Taxable income is declared by the statute to mean the amount of net income derived from sources within the District (D. C. Code Title 47-1580). As amended by the Act of May 3, 1948 the statute provides that income derived from the sale of tangible personal property by a corporation not carrying on or engaging in trade or business within the District shall not be considered as income from

sources within the District (D. C. Code Title 47-1551 to 47-1551c).

The words "trade or business" include the carrying on of any trade, business, profession, vocation or calling or commercial activity in the District, but do not include:

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office, agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article." (D. C. Code Title 47-1551c (h) as amended by the Act of May 3, 1948.)

Therefore, the doing of business in the District is not enough to impose a franchise tax liability.

The legislative history of the exemption provisions, added to the Act of 1947 by the Act of May 3, 1948 (S. 2409), shows a clear intent on the part of Congress to exempt from the words "trade or business", as used in the statute, sales of tangible personal property by traveling salesmen who do not have a residence in the District of Columbia and whose headquarters are located outside the District.

Senate Report No. 1042, 80th Cong., 2nd Sess., dated March 31, 1948, which accompanied S. 2409, stated:

"The purpose of the bill is to clarify and limit the imposition of a tax upon the income of corporations or businesses which is 'derived from sources within the

District of Columbia.' Due to the language appearing in the existing District of Columbia income-tax law, the imposition or assessment of the income tax was heretofore made against concerns casually engaged in business within the borders of the District of Columbia by such means as telephone, mail orders, *traveling salesmen* and other nonconsistent means of solicitation. This bill will correct such situation, and limit the imposition of an income tax to those concerns factually engaged in business on their own account or through representatives or agents within the District of Columbia." [Emphasis supplied]

Also see Hearings before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia (held in March and May 1948), at pages 118 and 119.

As petitioner did not have or maintain a warehouse in the District the question is, therefore, whether the manager of its Washington office, or any of its agents or representatives, had or maintained an "office" or "other place of business" within the meaning of the statute.

Petitioner's only establishment in the District during 1948 was a liaison office maintained for the purpose of obtaining information from various agencies of the Federal Government which might affect petitioner's operations. The office was not used for the purpose of promoting sales or for transacting business. The only reason for the office being here was because of the status of the District as the seat of the Federal Government.

This office as maintained by the petitioner was not a business office within the meaning of the decisions of the Court of Appeals for the District of Columbia in *Mueller Brass Co. v. Alexander Milburn Co.*, 80 U. S. App. D. C. 274, 152 F. 2d 142 (1945); *Layne v. Tribune Co.*, 63 App. D. C. 213, 71 F. 2d 223 (1934); *Neely v. Philadelphia Inquirer Co.*, 61 App. D. C. 334, 62 F. 2d 873 (1932); *Bilbrey v. Chicago Daily News*, 57 F. Supp. 579 (D. C. 1944). See also *Aktiebolaget Separator*, 45 B. T. A. 243 (1941).

In the *Mueller Brass Co.* case the Court of Appeals stated:

"The maintenance in Washington of a representative by a manufacturer for the purpose of gathering information from Government departments and agencies and for convenience of communication between the Government and the company in respect to Government work being done throughout the country, is not dissimilar to the maintenance of news-gathering agencies here by out-of-town newspapers. In respect to the latter this court has said:

" 'As the seat of national government, Washington is the source of much news of national importance, which makes it desirable in the public interest that many newspapers should maintain vigilant correspondents here. If the employment of a Washington correspondent, the announcement of his address, and the payment of his office rent, subjects a nonresident newspaper corporation to legal process in Washington for matter appearing in its paper at home, it would bring in nearly every important newspaper in the nation, and many foreign publishing corporations, which in our opinion the present statute does not do.' " (80 U. S. App. D. C. at 275). [Emphasis supplied]

As petitioner did not have an office or other place of business in the District within the meaning of the statute, it was not liable for the tax and the Board of Tax Appeals did not err in so holding.

CONCLUSION.

For the reasons set forth above petitioner respectfully submits that the decision of the Board of Tax Appeals for the District of Columbia must be reversed insofar as it held that it did not have jurisdiction of petitioner's appeal from the franchise-tax deficiency assessment of \$2,074.37, and the interest thereon. The petition for review of the appellee should be dismissed for lack of jurisdiction, but if it is not dismissed the decision of the Board of Tax Ap-

peals must be affirmed with respect to the claim for refund of appellant in the amount of \$1,000.

Respectfully submitted,

JAMES C. McKAY

JAMES E. CARR

Attorneys for Petitioner

701 Union Trust Building,
Washington 5, D. C.

COVINGTON & BURLING
Of Counsel

APPENDIX

INDEX TO JOINT APPENDIX.

	Page
Alternative Motion filed January 19, 1951	17
Amended Decision filed April 30, 1951	21
Cross Petition filed May 31, 1951	22
Decision filed January 12, 1951	16
Excerpts from Testimony and Proceedings	27
Witnesses:	
Alva Arth	90
Lewis W. Barnsley	58, 71
Marvin Blakney, Jr.	27
Eunice Bronson	99
James E. Carr	73
Phyllis R. Liberti	101
Richard S. Morgan	69, 78
Guy W. Pearson	84
Roy F. Smallwood	66
Walter G. Thomas	33, 71
George C. Updegraff	97
Judith A. Wilson	95
Exhibits	105
Petitioner's Ex. No. 1	105
Petitioner's Ex. No. 2	106
Petitioner's Ex. No. 3	107
Petitioner's Ex. No. 4	109
Petitioner's Ex. No. 4A	110
Respondent's Ex. D	110
Respondent's Ex. E	112
Findings of Fact and Conclusions of Law, filed January 12, 1951	7
Findings of Fact and Conclusions of Law, filed June 28, 1951	23
Memorandum filed January 12, 1951	13
Memorandum filed February 2, 1951	18
Memorandum filed February 23, 1951	19
Memorandum filed June 28, 1951	25
Motion filed January 19, 1951	17
Motion to Correct Filing Date of Cross Petition.....	23
Order filed February 2, 1951	17
Order filed February 23, 1951	19
Order filed April 30, 1951	19
Order filed June 28, 1951	27
Petition	2
Petition filed May 31, 1951	22

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 11,137.

OWENS-ILLINOIS GLASS COMPANY, *Petitioner,*

v.

DISTRICT OF COLUMBIA, *Respondent.*

No. 11,145.

DISTRICT OF COLUMBIA, *Petitioner,*

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent.*

**Petition for Review of Decision of the Board of Tax
Appeals for the District of Columbia.**

JOINT APPENDIX.

1 Filed Jul 19, 1950—Board of Tax Appeals for the
District of Columbia

CC. served
A.A. served

D

BOARD OF TAX APPEALS FOR THE DISTRICT OF COLUMBIA.

Docket No. _____

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

Petition.

The above named petitioner, Owens-Illinois Glass Company, hereby petitions for a cancellation of an assessment of franchise tax against it and alleges as follows:

1. The petitioner is an Ohio corporation with its principal office at Toledo, Ohio.

2. The tax in controversy is a franchise tax for the calendar year ending December 31, 1948, in the amount of \$3,074.37 plus interest in the amount of \$157.28, or a total of \$3,231.65.

3. The notice of assessment was dated June 30, 1950, and the tax was paid by the petitioner under protest in writing on July 19, 1950, as will appear in the copy of the notice of assessment hereto attached as Exhibit "A". Also attached as Exhibit "B" is a notice of assessment dated April 21, 1950, which was issued prior to the hearing on petitioner's protest to the proposed assessment and which was superseded by the notice dated June 30, 1950.

4. The assessment of the tax set forth on the notice of assessment is based upon the following errors:

(a) The Assessor erred in determining that there was a deficiency for the calendar year ending December 31, 1948, in the amount of \$3,074.37 plus interest of \$157.28.

2 (b) The Assessor erred in determining that petitioner was engaged in business within the District of Columbia during the calendar year ending December 31, 1948.

(c) The Assessor erred in determining that petitioner had any income from District sources during the calendar year ending December 31, 1948.

(d) The Assessor erred in determining that sales made by petitioner in the amount of \$794,867.12, during the calendar year ending December 31, 1948, were fairly attributable to business carried on within the District of Columbia by petitioner.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner's main business is the manufacture and sale of glass and allied products.

(b) Petitioner's principal office and place of business is in Toledo, Ohio.

(c) During the calendar year ending December 31, 1948, petitioner shipped directly to customers in the District of Columbia, from outside the District of Columbia merchandise in the amount of \$794,867.12.

(d) All of such merchandise shipped to customers in the District of Columbia was solicited by petitioner's salesmen who were attached to and travelled from sales offices of petitioner located outside the District of Columbia.

(e) Petitioner had no warehouse or storage facilities in the district of Columbia during the calendar year ending December 31, 1948.

3 (f) Petitioner, during the calendar year ending December 31, 1948, maintained an office in the District of Columbia located at 1627 K Street, N.W. Petitioner's office during the calendar year ending December 31, 1948, was used solely for liaison work with the Bureaus and Agencies of the United States Government. This liaison work consisted primarily of obtaining information on and data with respect to Federal regulations affecting petitioner's business.

(g) None of petitioner's employees in the District of Columbia office engaged in sales activity of any kind during the calendar year ending December 31, 1948.

(h) None of petitioner's employees attached to the District of Columbia office during the calendar year ending December 31, 1948, received any credit, commission, or salary by reason of any sales made by the Company during that period.

(i) Petitioner's District of Columbia office was not used for the making of sales during the calendar year ending December 31, 1948.

WHEREFORE, petitioner prays that this Board hear this proceeding, redetermine petitioner's tax liability, and find no income fairly attributable to any business of the petitioner in the District of Columbia or from sources within the District of Columbia for the calendar year ending December 31, 1948. Petitioner further prays that the aforesaid assessment be cancelled and a refund be paid to petitioner in the amount of \$3,231.65 plus interest thereon as provided by law.

JAMES C. MCKAY

JAMES E. CARR

Of Counsel:

Covington, Burling, Rublee,
O'Brian & Shorb

Counsel for Petitioner
701 Union Trust Building
Washington 5, D. C.

5

EXHIBIT "A"—Credit 1949 Levy

1948—FRANCHISE TAX—1948

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE ASSESSOR, D. C.

First Half

Second Half

Both Halves

Unpaid Balance

Deficiency X

Date of Assessment 6-30-50

Name	Total Tax	Previous Credit	Date Payment Due
Owens-Illinois Glass Company	3,074.37		
Ohio Bldg.,	* 150.39	1,000.00	2,224.76
Toledo, Ohio 9H 1801	*Interest from 6-30-50 @ 6%	4-15-49 to per annum.	

Interest on payment due at the rate of 6% per annum must be added if not paid on or before 7-10-50.

Interest at rate of 6% per annum from to

Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts., N.W., payable to his order. If receipt is desired, enclose stamped self addressed envelope.

Total Payment Due

Credit: 9017 Corpora-
tion Tax

6

EXHIBIT "B"—Credit 1949 Levy

1948—FRANCHISE TAX—1948

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE ASSESSOR, D. C.

First Half

Second Half

Both Halves

Unpaid Balance

Deficiency X

Date of Assessment 4-21-50

Name	Total Tax	Previous Credit	Date Payment Due
Owens-Illinois Glass Company	3,074.37		
Ohio Building	* 126.54	1,000.00	2,200.91
Toledo, Ohio 9H 1801	*Interest from 4-21-50 @ 6%	4-15-49 to per annum.	

Interest on payment due at the rate of 6% per annum must be added if not paid on or before 5-1-50.

Interest at rate of 6% per annum from to

Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts., N.W., payable to his order. If receipt is desired, enclose stamped self addressed envelope.

Total Payment Due

Credit: 9017 Corpora-
tion Tax

July 19, 1950

Assessor, District of Columbia
Washington, D. C.

File #9H 1801

Sir:

As attorney for Owens-Illinois Glass Company I am enclosing that Company's checks in the amounts of \$2,224.76 and \$6.89 in payment of the balance shown to be due on the assessment notice of June 30, 1950 which I also enclose.

The total of the deficiency assessment as shown on the notice of June 30, 1950, in the amount of \$3,074.37 plus interest totalling \$157.28 is hereby paid under protest.

All personal property shipped to customers within the District of Columbia during 1948 was solicited by salesmen attached to and working from sales offices located outside the District in that year. Such sales totalled \$794,867.12. None of these sales are fairly attributable to any business carried on within the District of Columbia by the Company nor are these sales attributable to any sources within the District of Columbia within the meaning of those terms as used in the District of Columbia Income & Franchise Tax Act of 1947 as amended.

As attorney for the Company I have, therefore, been authorized to advise you that the total amount set forth in the deficiency notice, i.e., \$3,074.37 plus interest in the amount of \$157.28 is paid under protest.

Very truly yours,

(Signed) JAMES E. CARR

ddg

Enclosures

* * * * *

Filed Jan. 12, 1951

Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. During 1948 and prior thereto petitioner, Owens-Illinois Glass Company, was an Ohio corporation, engaged in the manufacture and sale of glass containers. Its principal place of business was in Toledo, Ohio.

2. In 1942 it had opened an office in the District of Columbia in premises 1627 K Street. In 1948 that office was part of the administrative division of petitioner. The function of the administrative division was the handling of legal matters and all matters relating to petitioner's activities other than manufacturing and sales.

3. The function of the K Street office was to keep the administrative division in Toledo informed on the introduction and progress of all bills in Congress which, in the judgment of the manager of the Washington office, would have some effect on the operation of petitioner's activities; reporting on the regulations of the Treasury Department as they affected taxes and affected petitioner's business, the regulations of the United States Food and Drug Administration that affected the packing of food products and the style and shapes of bottles and jars; and keeping in contact with the Alcohol Tax Unit Division of the Treasury in the

9 way of getting permission to manufacture bottles of different designs and cases of different designs. Petitioner's Washington office also gathered the daily reports of the Department of Agriculture pertaining to crops, because that, to a certain extent, permitted petitioner to anticipate the demand for glassware. The office also kept petitioner's main office informed on labor regulations as they applied to women. It received news releases from a press service over a teletype in its office, and maintained a teletype for communication with petitioner's principal office. It also picked up regulations and bills and special documents or releases. The Staff of the office was com-

posed of its manager, his secretary, a stenographer, and another employee whose duty it was to keep the Toledo office informed on labor regulations as they applied to women. Petitioner made no sales to the United States Government by means of, or through, its Washington office.

4. None of the personnel of the Washington office performed any duties in connection with sale of goods shipped into the District; did not receive, retain or distribute price lists relating to petitioner's products. It did have catalogs in the office descriptive of the items manufactured by petitioner, but no price lists. The Washington office did not distribute these catalogs to customers or prospective customers in the District, and it did not receive, retain, or distribute information with respect to shipping date of petitioner's products, nor display samples of the products.

5. During 1948 petitioner made sales of glass containers and caps for bottles to customers in the District, amounting to \$794,867.12. Of these sales, \$201,241.04 were made by petitioner's selling personnel who worked out of its Philadelphia sales office, and \$593,626.08 were made by its selling personnel who worked out of its Baltimore sales office. The orders for these sales were solicited either personally in the District, or by mail.

10 Occasionally various members of petitioner's Baltimore office when they were in Washington, visited the District office of petitioner. These calls were of a social nature, and the Washington office was not used for the purpose of making sales, although on occasion the selling personnel may have used its telephone for the purpose of calling up their District customers and making engagements for personal interviews, having for their object the selling of petitioner's products. They occasionally called petitioner's Baltimore office from the Washington office.

6. At no time during 1948 did petitioner have a warehouse in the District, nor did it warehouse any of its products therein.

7. Petitioner's Washington office received inquiries with respect to its products, which it referred to its Baltimore office or to the Atlantic Glass Company.

8. The Washington office of petitioner consisted of nine rooms, which were used for the personnel of that office, a stationery room, a storage room, a teletype room and a room reserved for visitors from the legal division of petitioner who came to Washington for hearings before the Federal Trade Commission, with regard to tax matters or with regard to the National Labor Relations Board, and one room was occupied by a representative of the American Structural Products Company, a wholly owned subsidiary of petitioner, which manufactured glass blocks. Petitioner's Washington office had telephones, and its name was listed in the Washington telephone directory, both in the alphabetical section and, under the classification "Glass" in the classified section.

9. During 1948 petitioner sold and shipped directly to customers in the District of Columbia from outside the District, merchandise in the amount of \$794,867.12, which was .3693% of its total sales both within and without the

11 District. On April 15, 1949 petitioner filed with the Assessor for the District, a so-called tentative return, which gave no information about petitioner or its business, except its name and address. That return was accompanied by petitioner's check for \$1,000 which was thereafter paid by the drawee bank.

10. Thereafter petitioner filed its District of Columbia franchise-tax return for 1948. This return showed no tax liability.

11. On August 5, 1949 petitioner filed a claim for refund of the \$1,000 paid with its so-called tentative return, upon the ground that the so-called tentative return and the payment had been erroneously made.

12. On March 20, 1950 the Assessor addressed and sent to petitioner the following communication:

“REGISTERED LETTER
RETURN RECEIPT REQUESTED

March 20, 1950
Re: File #9103

Owens-Illinois Glass Co.
Ohio Building,
Toledo, Ohio

Gentlemen:

The examination by this office of your income and/or franchise tax return(s) for the year(s) ended December 31, 1948 indicates that the adjustment of your tax liability, as shown in the accompanying statement, is warranted.

IF YOU AGREE to the adjustment in tax as shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Interest will cease, as of date of assessment, upon payment of amount due to the Collector of Taxes, D. C., within ten (10) days from date of assessment.

IF YOU DO NOT AGREE to the proposed adjustment, you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency in tax against you.

Should you fail to file either the enclosed form of waiver or a written protest with this office within the thirty-day period mentioned, final determination of your tax liability will be made and notice and demand will be sent you in accordance with the provisions of law applicable to the assessment and collection of income and/or franchise tax deficiencies.

Yours very truly,

C. A. BEARD, JR.
Administrator

Enclosures:
Statement
Form of Waiver

Income and Franchise Tax Division

12

OWENS-ILLINOIS GLASS Co.
Ohio Building
Toledo, Ohio

Calendar Year 1948

Net taxable income, per Form D-20	\$18,392,617.60
Less: Interest	\$135,211.34
Rents	346,785.91
Royalties	63,383.51
Other Income*	1,197,495.10
Net taxable income subject to apportionment factor	\$16,649,741.74
x Revised D. C. apportionment factor**	.003693
Revised D. C. net taxable income	\$61,487.49
Tax at 5%	3,074.37
Less amount reported	None
Deficiency	\$3,074.37

*Exclusive of purchase discounts, totalling \$463,861.29, which constitute reduction of "cost of goods sold."

**Computation of revised D. C. apportionment factor:

A. Total net sales within and without the District of Columbia, per Form D-20	\$215,214,612.34
B. All sales of goods shipped into the District of Columbia, to the United States, the District of Columbia or others, per sales schedule submitted with your letter dated August 3, 1949	794,867.12
C. Revised D. C. apportionment factor (B#A)	.003693

It is the opinion of this office that the above computation reflects the income which is fairly attributable to business carried on within the District of Columbia.

Based on the foregoing, you are advised that your claim for refund of tentative tax paid in the amount of \$1,000.00 is herewith disallowed."

13. On June 30, 1950, the Assessor made an assessment against petitioner of franchise tax for 1948, and sent petitioner written notice thereof, in the form of a statement of taxes due. This statement showed a total tax of \$3,074.37, and also showed \$150.39 interest from April 15, 1949 to June 30, 1950 at 6 per cent per annum. It showed a credit of \$1,000 and a payment due of \$2,224.76.

The tax was based on .3693% of \$16,649,741.74, determined by the Assessor to be petitioner's net taxable income subject to the apportionment factor.

On July 20, 1950, under protest in writing, petitioner paid \$2,231.65, being the amount of the assessment plus \$6.88, interest thereon from June 30, 1950 to July 17, 1950, minus the \$1,000 paid on April 15, 1949 as above set forth.

13 14.. On July 19, 1950 petitioner appealed to this Board from the assessment, alleging that the Assessor had erred in determining the deficiency for the calendar year 1948 of \$3,074.37, plus \$157.28 interest; in determining that petitioner was engaged in business within the District during the year 1948; determining that petitioner had any income from District sources during 1948; and determining that sales made by petitioner in the amount of \$794,867.12 were fairly attributable to business carried on within the District by petitioner.

CONCLUSIONS OF LAW

1. Petitioner did not, during any part of 1948, physically have or maintain an office, warehouse or other place of business in the District, within the meaning of Article I, Title I, section 1(h), of the District of Columbia Revenue Act of

1947, D. C. Code Supp. VII, sec. 47-1551c (h), and was not engaged in carrying on a trade or business in the District within the meaning of said section.

2. Petitioner did not in 1948 derive income from sources within the District, within the meaning of Title X of Article I of said Act (Code sec. 47-1580), and did not have taxable income within the meaning of Title VII, section 1 of Article I of said Act (Code sec. 47-1571).

3. The assessment of the deficiency of \$2,074.37 and the interest thereon, against petitioner, appealed from, should be canceled; and the action of the Assessor in denying petitioner's claim for refund of \$1,000, appealed from, should be reversed.

4. Petitioner is entitled to a refund of \$2,231.65 with interest thereon at the rate of 4 per centum per annum from July 20, 1950 until the date of refund; and is entitled to a refund of \$1,000 without interest.

Decision will be entered for petitioner.

* * * * *

14

Filed Jan. 12, 1951

Docket No. 1215

Memorandum.

Article I of the District of Columbia Revenue Act of 1947 (61 Stat. 332) imposes a tax of 5% upon the taxable income of foreign and domestic corporations, for the privilege of engaging in trade or business within the District and of receiving income from sources within the District (Title VII, sec. 2) (D. C. Code 1940, Supp. VII, sec. 47-1571-a). By Title VII, sec. 1 (Code sec. 47-1571), "taxable income" is declared to mean the amount of net income derived from sources within the District, within the meaning of Title X (Code sec. 47-1580). Title X (Code sec. 47-1580), as amended by the Act of May 3, 1948 (62 Stat. 206, sec. 2), declares it to be the purpose of Article I to impose a franchise tax upon every corporation for the privilege of carrying on or engaging in any trade or business within the Dis-

trict, and receiving such other income as is derived from sources within the District, but that income derived from the sale of tangible personal property by a corporation not carrying on or engaging in trade or business within the District as defined in Title I (Code secs. 47-1551 to 47-1551c) shall not be considered as income from sources within the District for the purpose of Article I. Title I, sec.

1(h) (D. C. Code, sec. 47-1551-c-h) as amended by 15 the Act of May 3, 1948 (62 Stat. 206, sec. 1, provides that the words "trade or business" include the carrying on of any trade, business, profession, vocation or calling or commercial activity in the District, but shall not include:

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no officer, agent or representative in the District except for the sole purpose of doing business with the United States."

As appears from the foregoing, the tax is imposed on corporations for the privilege of engaging in trade or business in the District, and of receiving such other income as is derived from sources within the District, as the terms "trade or business" and "sources within the District" are legislatively defined and restricted.

These legislative definitions and restrictions must therefore be examined to determine whether the sales made by petitioner to District of Columbia customers are within the scope of the taxing statute. Under section 4(h) of Title I, as amended (Code sec. 47-1551-c-h) the words "trade or

business" do not include for the purposes thereof, sales by a corporation which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District; and under Title X (Code sec. 47-1580), income derived from the sales of property by a corporation not engaged in trade or business as so defined is not income from sources within the District.

16 Thus the doing of business in the District is not sufficient to impose tax liability, unless the other conditions are met. Petitioner did not have or maintain a warehouse in the District, and the inquiry therefore becomes whether the manager of its Washington information office, or any of petitioner's agents or representatives, had or maintained an "office" or "other place of business" within the meaning of the statute.

The only establishment of any kind which petitioner had in the District during 1948 was the office maintained for the purpose of getting information from various agencies of the Federal Government which affected or might affect the operations of petitioner. The office was not maintained or availed of for the purpose of promoting sales of petitioner's products in the District, or for the transaction of business. The only reason for its maintenance in the District was because of the status of the District as the seat of the Federal Government. The office would have been just as useful and no doubt would have been maintained by petitioner in the District even though it made no sales whatever to District of Columbia customers. Conversely, the sales to District customers were not affected by the presence of petitioner's office in the District, and would not have been affected by its removal therefrom. While petitioner's office was an office in the sense that it was used for petitioner's activities, it was not used as a business office or sales office, as distinguished from a place for the conduct of petitioner's non-business activities. In this connection the maxim *noscitur a sociis* is an aid in the ascertainment of

the legislative intent. *Street v. Lincoln Safe Deposit Co.*, 254 U. S. 88, 92; *U. S. v. L. & N. R.R Co*, 236 U. S. 318, 334;

17 *Virginia v. Tennessee*, 148 U. S. 503, 519. Interpreted in the light of its associated words, and viewed as a part of the phrase "office, warehouse or other place of business," "office" as used in the statute means a business office, as distinguished from an office for the collection of information. Such an office as was maintained by petitioner is not a business office under the decisions of the Court of Appeals in *Neely v. Philadelphia Inquirer Co.*, 61 App. D. C., 334, 62 F. (2d) 873; *Layne v. Tribune Co.*, 63 App. D. C. 213, 71 F. (2d) 223; *Fehlhaber Pile Co. v. Tennessee Valley Authority*, 81 U. S. App. D. C. 124, 155 F. (2d) 864. See also *Aktiebolaget Separator*, 45 B. T. A. 243.

As petitioner did not have an office or other place of business in the District within the meaning of the statute, it was not liable for the tax.

/s/ LAWRENCE KOENIGSBERGER,
Lawrence Koenigsberger,
Member Sole,
Board of Tax Appeals for the
District of Columbia.

* * * * *

18

Filed Jan. 12, 1951

Docket No. 1215

Decision.

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof and of the evidence adduced at the hearing on said petition, it is, by the Board, this 12th day of January, 1951,

ADJUDGED and DETERMINED:

1. That the deficiency assessment of income and franchise tax against petitioner, Owens-Illinois Glass Company, in the amount of \$2,074.37 and interest thereon in the amount of \$157.28, a total of \$2,231.65 be, and it is hereby

canceled, and that said petitioner is entitled to a refund thereof, with interest thereon at the rate of 4 per centum per annum from July 20, 1950 until the date of refund.

2. That the action of the Assessor in disallowing petitioner's claim for refund of income and franchise tax for 1948, in the amount of \$1,000 be, and it is hereby, reversed, and that said petitioner is entitled to a refund of said sum.

/s/ LAWRENCE KOENIGSBERGER,
Lawrence Koenigsberger,
Member Sole,
Board of Tax Appeals for the
District of Columbia.

* * * * *

19 Filed Jan. 19, 1951

Docket No. 1215

**Motion to Amend Conclusions of Law, to Vacate Decision,
and to Enter a Proper Decision.**

* * * * *

22 Filed Jan. 19, 1951

Docket No. 1215

**Alternative Motion to Amend Conclusions of Law, to
Vacate Decision, and to Enter a Proper Decision.**

* * * * *

24 Filed Feb. 2, 1951

**Order Overruling Motions to Amend Conclusions
of Law, &c.**

On this 2d day of February, 1951, the respondent's motion and its alternative motion to amend conclusions of law, and so forth, be, and they are hereby overruled.

* * * * *

25

Filed Feb. 2, 1951

Memorandum on Order Overruling Respondent's Motion and Overruling Motion to Amend Conclusions of Law &c.

1. Petitioner's claim for refund was authorized by Article I, Title XII, section 11 of the District of Columbia Revenue Act of 1947 (D. C. Code Supp. VII, sec. 47-1586j), and it is not prerequisite for the filing of such claims that payment should have been paid under protest. Protest is required only in the case of appeals from deficiency assessments, under section 5 (D. C. Code Supp. VII, sec. 47-1586d).

2. The appeal from the denial of the claim for refund was filed in time. What the respondent contends was a denial of the claim for refund, was included in a letter from the Administrator of Income and Franchise Tax Division, dated March 20, 1950, which stated that the examination of petitioner's return for 1948 indicated that the adjustment of its tax liability, as shown in the accompanying statement was warranted, and advising petitioner that it could, within 30 days, protest against the proposed adjustment. The statement attached to that letter contained the following language:

"Based on the foregoing, you are advised that your claim for refund of tentative tax paid in the amount of \$1,000, is herewith disallowed."

It will be seen that this was expressly based "on the
26 foregoing". The "foregoing" was a notice of intention to make an assessment, subject to right of protest, and was not a final action. The Board holds that the claim for refund was finally denied on June 30, 1950, upon which date the Assessor made a final determination of petitioner's tax liability, (Finding of Fact No. 13). The petition was filed within ninety days thereafter.

3. Respondent contends that the Board had no jurisdiction because the tax was not paid until the date after the appeal was filed with the Board. Both the payment of the tax and the filing of the appeal occurred within ninety days after the date of the assessment prescribed by D. C.

Code Sec. 47-2403. While this was not literal compliance with the statute so far as the word "first" is concerned, the Board holds that it is a substantial compliance therewith and was within the meaning and intent of Congress.

* * * * *

27 Filed Feb. 23, 1951

Order Vacating Decision of January 12, 1951.

On this 23rd day of February, 1951, the Board, of its own motion, hereby vacates its decision made herein on January 12, 1951, a motion to vacate which was denied on February 2, 1951, and the matter is hereby set down for further proceedings on the 7th day of March, 1951, at 10 o'clock a.m.

* * * * *

28 Filed Feb. 23, 1951

Memorandum on Order Vacating Decision of January 12, 1951.

This order is made in view of the decision of the Court of Appeals of February 23, 1951, in the case of District of Columbia v. McFall, No. 10,703.

* * * * *

33 Filed Apr. 30, 1951

Order Making Additional Findings of Fact and Amended Conclusions of Law.

On motion of petitioner, made after the decision of the Board of January 12, 1951 was vacated, this matter was set down for further proceedings and on March 7, 1951 additional testimony was taken with reference to the payment of the deficiency appealed from.

On this 30th day of April, 1951,

I. The Board hereby makes the following additional findings of fact:

15. The bill for the deficiency appealed from contains the following notation: "Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts. N.W., payable to his order."

16. On July 19, 1950, the attorney for petitioner who had been handling discussions of the proposed assessment with an examiner in the Income and Franchise division of the office of the Assessor, went to the office of the examiner and tendered him two checks aggregating \$2,231.65, in payment of the deficiency and the interest thereon, together with a letter stating that payment was made under protest. The examiner referred the matter to the bookkeeper, also an employee in the Assessor's office, to compute the interest, and upon her verifying the amount the examiner accepted the checks and turned them over to the bookkeeper, and filed the letter.

34 The bookkeeper took or sent the checks to the office of the Collector of Taxes. In that office the bill was stamped "Jul-20-50 \$2,231.65 Paid—Guy H. Pearson, Collector of Taxes, D. C." and was returned to petitioner's attorney. The bill and checks were stamped "Paid under protest."

17. The Collector of Taxes had not at any time officially authorized the Assessor or any one in his employ to receive payments of taxes as the agent of the Collector. It was not unusual for the Assessor's office to receive checks from taxpayers or their representatives. The Collector has advised the Assessor's office not to hold these payments.

18. When interest on a tax was required to be computed, the computation was made in the Assessor's office and the proper procedure was for the taxpayer thereupon to bring the bill showing the tax and the interest computation, to the office of the Collector and pay it. It sometimes happened that when deficiencies were paid or taxes were paid under protest, and when previous dealings had been with the Assessor's office, that the taxpayer either mailed the check to the Assessor or had a representative bring it in

with a letter showing protest, but it was the exception rather than the rule, and the Assessor's office gave no receipts.

19. The Collector had not advised the Assessor that he was not to undertake such procedure but the Assessor had been advised that he must not hold payments but must bring them to the Collector's office, and let the Collector have physical custody of them pending the determination of the payment.

20. The Collector's office closed at 3.45, and the Assessor's office closed at 4.45. When checks in payment of taxes were brought to the office of the Collector after 3.45 they were stamped "Paid" as of the next business day. It sometimes took a day or more for checks in payment of taxes that had been delivered in the Assessor's office to be transmitted by that office to the office of the Collector.

35 21. No witness recalled whether the checks hereinabove referred to were delivered to the Collector's office on the same day or on the following day.

II. The Board hereby vacates its Conclusions of Law Numbered 3, and 4, herein made on January 12, 1951, and substitutes in lieu thereof the following:

3. The Board is without jurisdiction of so much of the appeal as is from the deficiency of \$2,074.37 and the interest thereon, and to that extent the appeal from such deficiency assessment should be dismissed for lack of jurisdiction; and the action of the Assessor in denying petitioner's claim for refund of \$1,000 appealed from, should be reversed.

4. Petitioner is entitled to a refund of \$1,000.

Decision will be entered for petitioner for \$1,000.

* * * * *

36

Filed Apr. 30, 1951

Amended Decision.

This proceeding came on to be heard upon the petition filed herein; and upon consideration thereof, and of the evidence adduced at the hearing on said petition, it is, by the Board, this 30th day of April, 1951,

ADJUDGED and DETERMINED:

1. That the appeal of petitioner, Owens-Illinois Glass Company, a corporation, from the 1948 corporation income- and franchise-tax deficiency assessment of \$2,074.37, and the interest thereon, be, and it is, hereby dismissed for lack of jurisdiction.

2. That the action of the Assessor in disallowing the claim of said petitioner for refund of corporation income and franchise tax for 1948 in the amount of \$1,000 be, and it is, hereby reversed, and that said petitioner is entitled to a refund of said amount of \$1,000.

* * * * *

37

Filed May 31, 1951

Petition for Review of a Decision of the Board of Tax Appeals for the District of Columbia.

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. Owens-Illinois Glass Company, a corporation, petitions for a review by the United States Court of Appeals for the District of Columbia Circuit, of the decision of the Board of Tax Appeals made in the above-entitled proceedings.

2. The decision of which review is sought dismissed for lack of jurisdiction the appeal of Petitioner from the 1948 corporation income- and franchise-tax deficiency assessment of \$2,074.37, and the interest thereon.

3. The decision of the Board was entered on April 30, 1951.

* * * * *

38

Filed May 31, 1951

Cross Petition for Review of a Decision of the Board of Tax Appeals for the District of Columbia.

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the District of Columbia Circuit:

1. The District of Columbia, a municipal corporation, cross petitions for a review by the United States Court of Appeals for the District of Columbia Circuit, of the decision of the Board of Tax Appeals made in the above-entitled proceedings.

2. The decision for which review is sought reversed a denial of a claim for refund of franchise tax in the amount of \$1,000 for the period 1948.

3. The decision of the Board was entered on April 30, 1951.

* * * * *

40

Motion to Correct Filing Date of Cross Petition for Review.

* * * * *

52

Filed June 28, 1951

Findings of Fact and Conclusions of Law on Respondent's Motion to Correct Filing Date of Cross-Petition for Review.

FINDINGS OF FACT

1. The amended decision herein was made on April 30, 1951.

2. On May 31, at about 4:30 p.m., petitioner filed with the Clerk of the Board of Tax Appeals, a petition for review thereof by the United States Court of Appeals for the District of Columbia Circuit.

3. The Clerk immediately stamped the petition and docketed it. After a few minutes conversation with the attorney for the petitioner in regard to the record, she served a copy of the petition, a few minutes before 4:45, on the Corporation Counsel, by leaving such copy with a clerk-stenographer in the office of Assistant Corporation Counsel George C. Updegraff, Chief of the Tax Section of the office of the Corporation Counsel.

4. At the time of such service, Mr. Updegraff was absent from his room.

5. At about the time the Clerk of the Board of Tax Appeals was leaving Mr. Updegraff's room, Mr. William S. Cheatham, assistant to Mr. Updegraff, who had participated in some phases of the case, entered the room and the clerk-stenographer called his attention to the petition. The Clerk usually closed her office at 4:45, but on this day she remained until 5 o'clock.

53 6. At 5:15 Mr. Updegraff returned to his room and the clerk-stenographer gave him the copy of the petition. He immediately gave direction to Mr. Cheatham and the clerk-stenographer that a cross-petition for review be prepared and filed in the case. He and the Corporation Counsel had previously concluded that the District would file a cross-petition for review in the event a petition for review was filed by the petitioner. Before the cross-petition was finished, Mr. Updegraff telephoned the Member of the Board at his home and informed him of his intention to file a cross-petition for review.

7. About 5:45, Messrs. Updegraff and Cheatham came to the office of the Board and Mr. Cheatham slipped the petition with the necessary number of copies required by the Board rules under the door. By direction of Mr. Updegraff, Mr. Cheatham at about 6:30 on the same day, called the Clerk of the Board by telephone at her home and told her that he had put the petition at the door-knob because there was nobody at the office of the Board at the time.

8. At about 3:30 on the morning of June 1, an employee of the District whose duty it was to clean the office of the Board of Tax Appeals, entered the office and found the petition lying on the floor. She picked it up and laid it on a desk in the Clerk's office. When the Clerk came to work on the same morning, she found the petition on the desk. She did not have any means of knowing that it was the same petition that Mr. Cheatham had told her on the telephone he had left under the door, but she inferred that it was the same petition. She asked the Member of the Board what date she should put on it, and was told to stamp it June 1.

CONCLUSIONS OF LAW

1. The cross-petition for review was filed on May 31, 1951, within thirty days after the amended decision of the Board, within the meaning of District of Columbia Code 1940, section 47-2404(a).

2. The file stamp should be corrected to read "May 31, 1951."

* * * * *

54

Filed June 28, 1951

Memorandum on Respondent's Motion to Correct Filing Date of Cross-Petition for Review.

Petitioner, in opposition to respondent's motion, has cited *Lewis-Hall Iron Works v. Blair* (1928), 57 App. D. C. 364, 23 F. 2d 972. That case concerned an appeal to the United States Board of Tax Appeals. That Board had promulgated a rule to the effect that the office of the Board would be open each business day from 9 o'clock, a.m. to 4:30 o'clock p.m. The petitioner in that case had mailed a petition to the Board by special delivery. At 7:10 p.m. on the last day allowed by law for the filing of such petition, a Post Office messenger placed an envelope containing the petition in a slot of the door of the room where mail addressed to the Board was usually delivered, and it was found there the following morning. This Court held that the petition had not been seasonably filed, because the Board's office was closed, conformably to its rules, prior to the time when the postman placed the petition in the mailbox or left it upon the office floor, and accordingly, there was no one then at the office to receive the petition, and it was not received until the following day. The Court said that it is well established that in general, a paper is not "filed" within the contemplation of law until it is delivered to the proper officer to be filed by him.

The most recent pronouncement of the Court of Appeals on this subject is *McCord v. Commissioner of Internal Rev-*

55 enue (1941), 74 App. D. C. 369, 123 F. 2d 164. In that case a telegraphic petition to the Board arrived in the Washington office of the telegraph company at 4:12 p.m. and was there corrected at 4:24, on the last day allowed by law. The telegraph company had been instructed by the Board to deliver all messages for it over the Government telegraph wire, and had been authorized by the Board to receive its messages during the hours from 7:30 a.m. to 6 p.m. The telegraph company was unable to send the message over the Government wire at 4:24, because it was busy handling outgoing Government messages which had priority. The telegraphic petition was delivered by the telegraph company over the Government wire to the Government operator at 4:53. The Board's office hours, established by its rules, were from 9 a.m. to 4:30 p.m., and, under instructions from taxpayer's counsel, the telegraph company delivered a copy of the telegraphic petition to the Clerk of the Board at his home at 10:30 p.m. on the same day. It was held by the Court of Appeals that the petition had been seasonably filed.

The instant case differs from the McCord case in that the petition in this case was not delivered into the hands of the Member of the Board or of the clerk of the Board before the deadline. But, it also differs from both the McCord case and Lewis-Hall Iron Works cases in that, although this Board had the power under D. C. Code 1940, section 47-2408, to adopt rules of procedure, and had done so, it had not by rule established office hours, although it customarily closed at 4:45. In the McCord case the Court said that "a full opportunity, an open door, must be maintained for the potential filer until the clock strikes." In the absence of a rule providing otherwise for this Board, the clock does not strike until midnight of the last day.

To the extent that the McCord case is different from Lewis-Hall Iron Works v. Blair, the latter must be deemed to have been overruled.

As the cross-petition for review was left in the office of the Board on May 31 before midnight, it is believed that it was filed on that day.

* * * * *

56

Filed June 28, 1951

Order Directing Change of File Stamp.

On this 28th day of June, 1951, the motion of the respondent to correct the filing date of its cross-petition for review filed herein, is hereby granted, and the Clerk of the Board is directed to correct the date stamped thereon to May 31, 1951.

* * * * *

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

66 Marvin Blakney, Jr., was called as a witness by and on behalf of the petitioner and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McKay:

Q. Will you state your full name? A. Marvin Blakney, Jr.

67 Mr. Blakney, what is your occupation? A. I am president and general manager of the Doctor Pepper Bottling Company of Washington, D. C.

Q. What was your position—

Mr. Updegraff: What was that?

The Board: I did not get the name of the company.

The Witness: Doctor Pepper Bottling Company of Washington, D. C.

By Mr. McKay:

Q. Was that your occupation in 1948? A. Yes.

Q. During the entire year? A. The entire year, 1948.

Q. Where is your company located? A. Our plant and entire offices are at 6101 Blair Road, Northwest.

The Board: Is that in the District?

The Witness: In the District of Columbia.

By Mr. McKay:

Q. Was your company a customer of the Owens-Illinois Glass Company during the calendar year 1948? A. Yes.

Q. What items did you purchase from that company during the year 1948? A. To the best of my knowledge, we purchased glass bottles and wooden cases.

68 Q. For what purpose? A. For the use of production of Doctor Pepper and Tru-Ade.

Q. Where do you distribute Doctor Pepper and Tru-Ade in bottles? A. We distribute our products throughout Washington and the Washington metropolitan area and nearby Maryland and Virginia.

* * * * *

Q. Did the Owens-Illinois Glass Company furnish you with all your bottle requirements during the year 1948? A. Yes, sir.

Q. Now, sir, did you deal with salesmen of the Owens-Illinois Glass Company during that period? A. Yes.

Q. Can you tell us the names of the persons with
69 whom you dealt? A. L. W. Barnsley.

Q. Was he the only one you dealt with that you recall? A. Possibly Ed Randlett.

Q. Now, do you know of your own knowledge what capacity Mr. Barnsley and Mr. Randlett worked for the Owens-Illinois Glass Company? A. Well, they were representatives of it.

* * * * *

By Mr. McKay:

Q. I want to know if, of your own knowledge, you know in what capacity these men work for the Owens-Illinois Glass Company; you can say yes, if you do. A. Yes, I do know.

Q. What was that, sir? A. Salesmen and sales representatives for that company.

Q. And do you know of your own knowledge where the headquarters of these two men were? A. Baltimore, Maryland.

Q. And I will ask you whether in 1948 you knew that the Owens-Illinois Glass Company had an office located at 1627 K Street, Northwest, in the District of Columbia?

70 A. Yes, I knew they had an office there.

Q. Did you know the function of that office? A. Not precisely, except that it did not have anything to do with our business.

Q. Did you ever meet Mr. Walter Thomas, the man in charge of that office? A. Yes, I met him socially.

Q. Will you tell us when you met him? A. I believe that it was a Christmas party either in December, 1947, or December, 1948.

Q. Is that the only time up until today that you have seen Mr. Walter Thomas? A. I have possibly seen him in town, but I could not say any specific time.

Q. Do you know any other of the staff of that office, that is, the staff who were employed there in 1948? A. No, sir.

Q. Now, will you tell us, sir, in some detail the procedure which you and your company follows in purchasing bottles and glassware from the Owens-Illinois Glass Company?

* * * * *

71 The Witness: The transactions or arrangements that we make to purchase bottles are made with the representatives of Owens-Illinois from the Baltimore office. Our orders for shipments or delivery, our changes, are all made with that office in Baltimore.

By Mr. McKay:

Q. You say this occurs prior to the year in which the merchandise will be delivered; is that correct? A. Yes, sir.

Q. Now, during the course of the year—I am specifically, of course, referring to the year 1948—did these salesmen

call upon you, Mr. Randlett and Mr. Barnsley? A. Yes, sir, usually monthly.

Q. Now, did you ever order any bottles in 1948 from Owens-Illinois Glass Company over the telephone? A. Yes, sir.

72 Q. How would that take place; who would initiate a telephone call? A. I would initiate the telephone call. I would call the Baltimore office on long distance and ask for Mr. Barnsley or Mr. Randlett, or in their absence we speak to the secretary of either of these gentlemen and tell them what I wanted. Then I would usually confirm that by letter directed to their office, which is in the First National Bank Building in Baltimore.

Q. Did you ever call the K Street office here in the District of Columbia for any purpose whatsoever in 1948? A. No, sir.

Q. Did you ever write the K Street office a letter? A. No, sir.

Q. Did you ever telegraph them or communicate with them in any way? A. No, sir.

* * * * *

73 Q. Did anyone from the K Street office ever communicate with you in any way? A. No, sir.

Q. In 1948? A. No, sir.

Q. Now, sir, in 1948, when you wanted information as to prices or shipments or any information whatsoever in connection with the purchase of bottles, whom did you call? A. Mr. Barnsley at the Baltimore office.

Mr. McKay: I have nothing further.

Cross Examination

By Mr. Updegraff:

Q. Mr. Blakney, Mr. McKay asked you if anyone from the K Street office of the petitioner here ever called you and you said no. Did anyone call you at all representing the petitioner during 1948? A. Mr. Barnsley and Mr. Randlett that I am certain of.

Q. Mr. Randlett is one of the salesmen? A. Yes, one of the salesmen.

Q. Now, did Mr. Barnsley tell you when he called you where he was calling from? A. Usually he called me from—

Q. No, I want you to answer my question: Did he tell you where he was calling from? A. I cannot remember that.

Q. Did Mr. Randlett tell you where he was calling from?

A. I cannot remember that.

74 Q. You do not know whether he was calling from the District or Silver Spring, Maryland, or Virginia, or anywhere else, do you? A. Yes, sir, you can tell the difference between a local and out of town call.

The Board: How can you tell the difference?

The Witness: By the operator asking for you by name.

The Board: Are calls from Baltimore made in the same way as local calls?

The Witness: No, sir.

* * * * *

75 Q. Now, prior to and since 1948, have you had any
76 contact with any of the petitioner's officers or employees at the K Street office in the District?

* * * * *

The Witness: No, I do not recall.

By Mr. Updegraff:

Q. You would not be sure about that?

Mr. McKay: I object.

The Witness: I am sure. I do not recall any.

By Mr. Updegraff:

Q. Do you know of your own personal knowledge whether either Mr. Barnsley or Mr. Randlett, salesmen of the petitioner, had any residence or place of business in the District during 1948? A. Mr. Barnsley lived in Baltimore.

* * * * *

77 By Mr. Updegraff:

Q. When Mr. Randlett called you on the telephone, did he ever tell you where he was calling from? A. Yes, sir.

Q. Did he tell you on every occasion? A. No.

Q. When he did tell you, where did he tell you he was calling from? A. Mr. Randlett usually called from Baltimore and said he would be in Washington the next day and what time could he see me.

Q. In other words, as I understand your answer, when he called you from Baltimore when he wanted to see you, he said, "I am in Baltimore and I want to see you"—the next day; is that right? A. Yes.

Q. Have you ever personally been in the Owens-Illinois Glass Company's office on K Street in the District? A. Yes, sir.

78 Q. When?

The Board: He said he was there for a Christmas party.

By Mr. Updegraff:

Q. When were you there? A. Either December, 1947, or December, 1948.

Q. On only one occasion? A. To the best of my knowledge that is probably the only occasion.

Q. Now, when you were at the K Street office, did you see any samples of bottles or other glassware there? A. No, they had no sample bottles on display. They had other types of glass.

Q. They had what? A. Other types of glass.

Q. What other types of glass? A. Tumblers and glassware.

Q. You mean drinking glasses? A. Yes.

Q. What else? A. Oh, vases, ornamental glassware, glass brick, but no bottles.

Q. Did you see any price list on the wall anywhere
79 in the K Street office? A. No, sir, it was a party.

* * * * *

Redirect Examination

By Mr. McKay:

Q. Mr. Blakney, to the best of your recollection, with what frequency did Mr. Randlett or Mr. Barnsley call you by telephone in 1948? A. I would say once a month.

Q. Do you know as a fact at the time any of those calls were made that Mr. Barnsley or Mr. Randlett were in the District of Columbia? A. Yes, they have called me from the District of Columbia.

Q. Now, do you know where Mr. Barnsley lives, of your own knowledge? A. In Baltimore, Maryland, at that time.

Q. In 1948? A. In 1948.

80 Q. Do you know where Mr. Randlett lived in 1948? A. In Baltimore.

The Board: When you were called from a Washington telephone, what was the purpose of those calls?

The Witness: An appointment to see me, usually.

The Board: Was there any solicitation of business?

The Witness: Nearly all solicitation of business was made in person in my office.

* * * * *

The Board: They would make an appointment and then come the next day or two days later and I presume when they came over they came over to get orders and not just to say hello.

Mr. McKay: That is right; I misunderstood you.

The Board: That is correct; is it not?

The Witness: Yes, sir.

* * * * *

81 **Walter G. Thomas** was called as a witness by and on behalf of the petitioner and, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McKay:

Q. Will you state your full name? A. Walter G. Thomas.

Q. And what is your occupation, Mr. Thomas? A. Wash-
 82 ington manager of the office of the Owens-Illinois
 Glass Company.

Q. Are you an officer of that company? A. Yes.

Q. Will you state what office you hold? A. Assistant sec-
 retary and assistant treasurer.

* * * * * * * * *

Q. Where is the principal place of business of the
 83 Owens-Illinois Glass Company? A. Toledo, Ohio.

Q. And will you tell us the principal business of
 the Owens-Illinois Glass Company? A. The manufacture
 and sale of glass containers.

Q. Now, Mr. Thomas, you stated you were manager of
 the Washington office; where is this office located? A. 1627
 K Street, Northwest.

* * * * * * * * *

Q. When were you first manager? A. July, 1944.

* * * * * * * * *

Q. In 1948, sir, did the Owens-Illinois Glass Company
 have a warehouse in the District of Columbia? A. No.
 84 The Board: Wait a minute: Did they have goods
 warehoused in the District in somebody else's ware-
 house?

The Witness: For the storage of goods of our owner-
 ship?

The Board: Yes.

The Witness: No, sir.

By Mr. McKay:

Q. Now, Mr. Thomas, whom did you report directly to
 in 1948? A. To the Administrative Division in Toledo,
 Ohio.

Q. What person, sir, and what was his position? A. There may be a division in the year in which I reported to Mr. F. G. Solon; and later the same year the direction of this office was transferred to a Mr. Philip B. Niles.

Q. Were they connected with the Administrative Division of the Owens-Illinois Glass Company? A. Yes.

Q. And was your office a part of the Administrative Division of the Owens-Illinois Glass Company in 1948. A. Yes.

Q. I wonder if, sir, you would briefly describe the various divisions of the Owens-Illinois Glass Company, showing where the Administrative Division fits into the general set-up?

* * * * *

85 The Board: I would like to know what the Administrative Division is.

By Mr. McKay:

Q. What is the Administrative Division; what does it do? A. Well, perhaps, I can better state it by saying that there are three general classifications, manufacturing, sales, administrative, to our business.

The administrative is other than those two. All legal matters are within the Administrative Division.

The Board: Trying to keep taxes down?

The Witness: Yes, sir, taxes of the various States. Then, there is public relations—

The Board: That is enough. I want to know why it was not a selling outfit.

By Mr. McKay:

Q. Now, I will ask you then to describe in detail the function which your office, as a part of the Administrative Division, performed in 1948 in the 1627 K Street office of which you are manager. A. Well, a broad description would be our office, the Washington office—you would call our
86 office the Washington relations office of the Owens-Illinois Glass Company.

We keep the Administrative Division in Toledo informed on the introduction of all bills into the Congress and report on the progress of those bills, which in our judgment would have some effect on the operation of our activities.

The Board: Would that cover taxes and labor relations and that sort of thing?

The Witness: Well, no, sir, that is one phase of it.

We report on the regulations of the Treasury Department as they affect taxes and affect our business.

The Food and Drug Administration has a close relationship to the glass business, the glass bottle and jar business, for the reason of their regulations as they affect the packing of food products.

We maintain, incidentally, a research laboratory in Toledo and there is the relationship between ourselves and the Food and Drug Administration on that side.

They also have regulations that pertain to the style of bottles and jars with regard to deceptive shapes.

The Board: What did the Treasury have to do with that? Did you make bottles to contain liquor?

The Witness: I am reaching that in a moment, sir.

We are a very large manufacturer of liquor ware, the shapes, lettering, color, and—

The Board: Was that the reason for your contact with the Treasury and interest in bills affecting the Treasury?

The Witness: Yes, it could be, but more in the Alcohol Tax Unit Division of the Treasury.

We have direct contact in the way of getting permission to manufacture bottles of different designs and cases of different designs, getting their permission. I have virtually a weekly contact with that office.

We gather the daily reports issued by the Department of Agriculture as they pertain to crops, because that in a measure permits us to anticipate the demand for glassware.

The Board: I think that is enough detail, Mr. McKay. It indicates to me they keep in contact with all kinds of de-

velopments either in the legislative or executive departments of the Federal Government which might affect that business in any way at all.

Mr. McKay: Is that a fair statement of what occurred in 1948?

The Board: Is that a correct statement?

The Witness: Yes, sir.

* * * * *

Q. Now, Mr. Thomas, how many employees were assigned to your office, not counting yourself, in 1948; that is, the K Street office? A. There were three, I am positive.

* * * * *

88 Q. Now, briefly, would you describe the duties of these persons? I take it that they helped you accumulate the data which you spoke of a moment ago, so don't go into too much detail. A. Well, one was my secretary.

The junior stenographer did miscellaneous duties and errands around the office.

Mrs. Van Neys was really a representative of the personnel division, which comes under the administrative division in Toledo with respect to the employment of women.

89 I think during the war there were a great many questions arose as to the employment of women in factories under the Labor Control Board and there were often cases arose where permission must be obtained to work these women at hours other than those provided in the normal regulations. Mrs. Van Neys was here to keep—

The Board: But in 1948 the war was over three years.

The Witness: That is how she was employed—that was the reason she was employed in the first place, sir, and that work diminished and she has since resigned because there was not enough work of that sort.

The Board: What did she do in 1948?

The Witness: That sort of work.

The Board: In 1948 the war was over and had been for three years.

The Witness: I only mentioned that because her employment was of an unusual character. She was employed during the war because of the employment of a tremendous number, a relatively tremendous number of women in our factories.

Just as soon as the war was over she was not dispensed with. She carried on that sort of work until there wasn't apparently any more to do and we relieved her.

The Board: Well, when were those controls discontinued? It was very shortly after the Japanese surrender; was it not?

The Witness: You mean after 1946 and 1947?

90 The Board: The Japanese surrendered in August of 1945; did they not?

The Witness: She did not work under my direction, sir, at that time. She came in to me, I think, during the year 1948—came down to Washington.

By Mr. McKay:

Q. What did she do for you in 1948? A. She kept our main office, the administrative division in Toledo, informed on the labor regulations as they applied to women.

She also left the office and went to the different States in which we have factories when we became involved in those regulations.

The Board: Did she assist you in any way in your duties?

* * * * *

The Witness: Yes, had she not obtained the information from the Labor Department with respect to the employment of women under the Federal regulations, I should have had to obtain it.

The Board: But she reported directly to Toledo?

* * * * *

The Board: To whom did she report, to you or Toledo?

91 The Witness: She reported to me with respect to her daily conduct, but really the request for information came—when such requests originated—from Toledo.

By Mr. McKay:

Q. I take it by your testimony, then, none of these persons were sales personnel? A. No.

Q. None of them were trained in selling? A. No.

Q. Now, did any of the persons in that office in 1948, including yourself, perform any duties whatsoever in connection with the sale of tangible goods shipped into the District of Columbia by the company? A. No.

Q. Now, sir, speaking again of course of the year 1948, did your office receive, retain or distribute price lists relating to the products manufactured by the Owens-Illinois Glass Company? A. No, we have catalogues in the office, but nothing other than that.

Q. Describe those catalogues, sir. First of all, you say you did not have no price lists; is that correct? A. No price lists.

Q. And what sort of catalogues are these? A. Well, they are descriptive of the items that the Owens-Illinois Glass Company manufactures.

92 Q. Did you distribute any of these catalogues to customers or prospective customers within the District of Columbia? A. No.

Q. Did you or your office receive, retain, or distribute any information in 1948 with respect to shipping dates of products manufactured by the Owens-Illinois Glass Company?

* * * * * * * *

A. I did not

Q. I will ask you, sir, whether your office in 1948 or any member thereof distributed any information whatsoever to prospective customers, or customers of the company within

the District of Columbia? A. Certainly not to my knowledge.

The Board: Did you have samples of your products on display in your office on K Street?

The Witness: In 1948, no, sir.

By Mr. McKay:

Q. Now, sir, were any commissions, or any remuneration of any kind, paid to any of the employees of the K Street office in 1948 in connection with the sale of products manufactured by the company? A. No.

Q. Was the District of Columbia office credited with any of the sales of products manufactured by Owens-
93 Illinois Glass Company which were shipped into the District of Columbia? A. No.

Q. Were any of the expenses of the District of Columbia office charged to the cost of sales of products manufactured by the Owens-Illinois Glass Company and shipped into the District of Columbia? A. No.

* * * * *

Q. Did any of the employees attached to the District of Columbia office in 1948 solicit, effect, or negotiate any sale of products shipped into the District of Columbia, which were manufactured by the Owens-Illinois Glass Company? A. No.

The Board: Do not confine yourself to the manufacture by the Owens-Illinois Glass Company. Ask it so as to embrace any product from any company.

By Mr. McKay:

Q. I will say any product manufactured or distributed or in any way dealt with by the company.
94 A. No.

* * * * *

Q. Now, do you know of your own knowledge what persons did sell to customers of the Owens-Illinois Glass Com-

pany in the District of Columbia in 1948? A. You mean from without my office?

Q. Well, anywhere; yes, sir. A. Yes, I know of them.

Q. What are the names of such persons? Will you give us the names? A. The salesmen from the Baltimore office.

Q. What were their names? A. Mr. Barnsley, who was here, and Mr. Randlett.

Q. Mr. Wilkins? A. Mr. Wilkins—I have forgotten his first name. Those are the only ones I know of.

Q. The only ones you know of? A. Yes.

Q. And these persons were attached to the Baltimore office? A. Yes.

Q. Now, sir, during the year 1948, did any of such
95 persons visit your K Street office? A. Yes.

Q. And which of such persons? A. All three of those.

Q. And you were present then when these visits were made? A. On different times I would see them.

Q. And to the best of your recollection, with what frequency did Mr. Barnsley visit your office in 1948? A. Oh, it is more or less of a guess—I would say twice a month.

Q. With what frequency would you say that Mr. Wilkins visited your office in 1948? A. Not as frequently, but let's say once a month—it is difficult for me to answer.

Q. Would that apply to Mr. Wilkins, too? A. You just asked me about Wilkins.

Q. Would that apply to Mr. Randlett, too? A. Yes.

Q. How long have you known Mr. Barnsley? A. Oh, 15 to 18 years.

Q. I take it he is a personal friend of yours? A. Yes.

Q. And speaking of these visits of these three men, do you recall at what hour of the day these visits occurred? A. Invariably in the latter part of the day.

Q. Would you say before or after office hours?
96 A. At closing time they would come in, usually—Mr. Barnsley would come in particularly at 5:00 o'clock.

Q. Well, how about the other two men: When would they come in? A. Usually the same time.

Q. Now, you just tell us, if you will, what these persons did when they visited your office. You can take one at a time, if you wish. A. Well, Mr. Barnsley—I would say I have known him for a good long time—made it a practice of visiting my office. For what purpose, other than to make an inter-company call and to visit with me is all; and the other boys likewise.

Q. Did they have any particular interest in your office? A. No, I do not know—I cannot say that they had, other than company patronization.

Q. Did your office maintain any facilities for their use, such as desks, telephones, stationery, and whatnot? A. No desk; there was never any space allocated to it, nor was it used.

There was a telephone available if they wanted it and they no doubt used it.

Q. Were you present at any time they used it? A. Well, it would be too casual for me to remember, but I can say that they have called there—I remember distinctly—
97 no particular calls, but I distinctly remember calls to the Baltimore office, because we have collected for them. The firm has a long distance call tie and if they make calls to their head office they pay us for it, if they do not call collect.

Q. How long were these visits on the average, sir? A. Between 5:00 and 6:00.

Q. About an hour? A. Yes.

Q. What was Mr. Barnsley's job in 1948? A. The Baltimore manager.

Q. Would you state whether Mr. Barnsley's visits, other than as to their frequency—you stated he visited a little more frequently—was typical of the visits of the other men? A. Yes.

Q. Do you know how many customers the Owens-Illinois Glass Company had in 1948 in the District of Columbia? A. No.

Q. I take it you do not know, then, that W. P. Ballard was a customer of the Owens-Illinois Glass Company in 1948?

* * * * *

98 A. I never heard of them.

Q. Do you know or have you ever known any employee or officer of that company? A. No.

Q. I will ask you the same question with respect to the Burma Coal Company. A. I never heard of them.

Q. And you know no officer? A. No.

* * * * *

99 Q. What about the Chestnut Farms Dairy? A. I know Mr. Jerry McCarthy.

Q. Do you know his position, what it was in 1948? A. I would say he is the senior man in the company; I do not know his title.

Q. Did you ever do business with him? A. Never.

* * * * *

100 The Board: Can you give us the names of any persons or business organizations that you know were customers of your company in 1948?

The Witness: Well, I know this customer, the Chestnut Farms. I know one or two officers of the Heurich Brewing Company and the Rock Creek Ginger Ale Company. It may be I know more—and the Peoples Drug Company—and it may be that I know some more, that I know more of them but I cannot recall at the moment.

The Board: Do you have a list of them?

Mr. McKay: I have a list of 20. Shall I let him look at it?

The Board: Yes.

By Mr. McKay:

Q. Does this refresh your recollection, sir? A. Ballard, Burma Cola Company, and I already mentioned I know some of the staff officers of the Heurich Brewing Company—

The Board: Do not repeat any you talked about. Are there any others?

The Witness: The Doctor Pepper Bottling Company—I met this gentleman who was in here this morning once before, so he reminded me this morning; and the Rock Creek Ginger Ale Company, and that is all.

By Mr. McKay:

Q. Did you ever do any business with any of these
101 gentlemen who were officers or employees of this company in 1948? A. These companies?

Q. Yes, sir. A. No, sir.

Q. Now, sir, I will ask you whether or not in 1948 the corporate name of the Owens-Illinois Glass Company was listed in the classified section of the telephone director in the District of Columbia. A. Yes.

Q. Will you explain how it happened to be listed? A. I really do not know. It was listed when I came to the company and remained there.

Q. Now, will you tell me, sir, if you know, whether or not each year you renew—you affirmatively renew—your listing in the telephone book, or whether or not that is done automatically unless you ordered the telephone company not to list it? A. Because of this case, I reviewed that matter recently and the renewal of the advertising was of an automatic character. It was trivial in amount and simply continued and the woman in the office who approves the bills approved it.

* * * * *

102 Q. Now, sir, is the American Structural Products Company a wholly-owned subsidiary of your company? A. Yes.

Q. When was that company formed? A. My recollection is 1947.

Q. Prior to its formation, did the Owens-Illinois Glass Company—did your office—do any selling of glass in the District of Columbia? A. We sold glass blocks.

Q. And was your corporate name in the telephone directory at that time? A. Yes.

Q. You do not now sell glass blocks, or did not in 1948? A. No, the Owens-Illinois Glass Company does not sell glass blocks.

103 The Board: You are talking now about building blocks?

The Witness: Yes.

* * * * *

Cross Examination

By Mr. Updegraff:

* * * * *

Q. Mr. Thomas, how many rooms does the petitioner in this case have at its K Street office in the District of Columbia? A. Nine.

Q. How many rooms do you occupy and did you occupy in 1948 as your own office? A. Our own office, as distinguished from what, sir? They are all our offices.

* * * * *

105 Q. In other words, you had an office by yourself? A. Yes.

Q. And the three employees each had separate offices for themselves; is that correct? A. Yes, but in the case of my secretary and receptionist, they changed sometimes and there were two in that one office, but generally speaking, each had a separate office.

Q. So that of the nine rooms comprising the whole offices of the petitioner, at the most only four of them were used by you and your three employees; is that correct? A. Actual occupancy—there were other people in the office, you know, in the building.

Q. Well, tell the Board what the remaining rooms were used for. A. Well, the American Structural Products Company had a representative there.

There is an office for the visitors from Toledo.

They have a stationery room.

We have a room for a teletype.

Q. A what? A. Teletype, which cannot be occupied by anyone.

Q. And what else? A. And a general storage room, a room for that purpose.

Q. A general storage room: What was in the storage room? A. There is a Coca-Cola dispenser, a wash
106 basin, some old samples of the products we manufacture, the glass block principally, and it is just a general utility room.

Q. Did you have on display or in the storage room any water tumblers or things of that kind, vases? A. Not on display.

Q. Well, where did you have them? A. Some items we manufacture were in a closed cupboard.

At one time during the war we had a show case showing the items that we manufacture, that the company as a whole manufactured. We took that down in 1946 and the items that were worth keeping were stored in the cupboard in this general utility room I mentioned.

Also these glass blocks that we manufacture are stored in there today.

Q. You say you took down your display in 1946? A. Yes.

Q. That was before you had the Christmas party at the office here in the District? A. What do you mean by a "Christmas party"?

Q. Did you have a Christmas party at your office? A. We had them for two or three years.

Q. What were the years? A. I do not know; I would say '45, '46 and '47.

Q. Did you have one in '48? A. I do not recall; I do not think so, no.

107 Q. You are absolutely certain you took down the display case? A. It was down before 1948.

Q. I thought you said a while ago it was taken down in 1946. A. I am not quite sure on that point.

Q. Well, then, you are not sure just when it was taken down? A. It was not there in 1948. Now, whether it was taken down in 1946 or 1947, I do not recall. I think it was 1946.

Q. Now, this teletype about which you testified, how long has that been there? A. Four years.

Q. Now, that is a machine, is it not, for sending messages from your office to other points in the country and also receiving them? What is it for? A. It is a news ticker, a teletype.

* * * * *

Q. What do you use it for? A. To receive the daily news releases of the United Press.

Q. Now, do you have that connected with your home office? A. No, that service is not available.

We have a teletype for communicating with the
108 home office and it is still in another room.

Q. But it is in your local office? A. That is right.

Q. You can communicate with your Toledo home office in Toledo by means of a teletype from your office? A. Yes.

The Board: Well, with which office of the United Press was the other teletype connected, the Washington office?

The Witness: The Washington office—we subscribe to the United Press service here in Washington, sir.

The Board: Where do the messages from the United Press that you receive originate?

The Witness: Here in Washington.

The Board: Well, how many teletype machines do you have?

The Witness: Two.

The Board: One between you and the UP and the other between you and the home office?

The Witness: That is right.

By Mr. Updegraff:

Q. Now, were you with Mr. Barnsley at all times during the occasions of his visits to your office here in the District? A. No.

Q. You do not know whether he used the teletype to your home office, or whether he made telephone calls, do you?

A. Well, he came in the office when I was not there, 109 of course, and I do not know what he was doing.

Q. He could have used the telephone or the teletype; is that true? A. By permission of the girl he could have used the teletype.

Q. You had no rule or policy against his using those facilities? A. No, he had to get permission to use the teletype. He paid for the telephone if he used it.

Q. What were your hours in the local office, Mr. Thomas? A. Normally from 9:00 to 5:00.

Q. During the year 1948 were you there during the office hours from 9:00 to 5:00 every day? A. Yes.

Q. You mean you never left the place from 9:00 to 5:00? A. Oh, no, I would not say that. Those are my normal hours.

Q. Didn't you do a lot of this picking up of regulations and bills yourself? A. Personally, never.

Q. You never did? A. I cannot remember. We employ a person to do it. I would not have occasion to do it. I might go down for a special document or release.

110 Q. Who did that in your office? A. We employed an outside service for that.

The Board: What do you mean by an outside service, somebody other than an employee?

The Witness: Yes, we have a man that picks up releases from all the government offices from which they are issued twice a day.

In an emergency, I may explain that something may be announced over this news ticker, the United Press, and we would send one of the girls from the office, or on occasion I might go myself and pick up that urgent release that had been announced over the teletype.

* * * * *

Q. Mr. Thomas, how many rooms does the American Structural Products Company have and did have during the

year 1948 in your Washington office? A. One for the representatives and he used the part-time girl in the adjoining office. The girl sat in there when this man needed her services. He also occupied the utility room with their sample, for whatever use they made of it.

Q. Do you know the purpose for creating the American Structural Products Corporation as a subsidiary of the petitioner? A. No, sir.

* * * * *

111 By Mr. Updegraff:

Q. Did you ever attempt to find out? A. No.

* * * * *

113 Q. You have some lettering on the front door of your local office here in the District, do you not, Mr. Thomas? A. Yes.

* * * * *

The Witness: To the best of my knowledge it had "Owens-Illinois Glass Company" and the trademark.

* * * * *

Q. Prior to 1948, what did the sign say, immediately prior thereto?

* * * * *

114 The Witness: Somewhere—at least sometime since 1947—the name "American Structural Products" has been put on the door. Whether that was on there in 1948 or not, I do not know. I think it was. I think it was put on there soon after that company was incorporated and it is on there now.

By Mr. Updegraff:

Q. Did you have anything on the door to the district office during 1948 or immediately prior thereto with respect to the roofing division of the petitioner in this case? A. No.

Q. You are certain of that? A. Certain.

* * * * *

116 By Mr. Updegraff:

Q. Well, Mr. Thomas, prior to the calendar year 1948, did the matter showing on the door of the K Street office of the petitioner show that the petitioner's roofing
117 division was located there? A. No.

Q. Did it show it as to the year 1948?

* * * * *

A. No.

* * * * *

Q. Do you know whether there were in fact any sales of tangible personal property by your company, the
118 petitioner here, made here to the United States during the year 1948? A. I do not recall or do not know of any.

Q. You do not know of any? A. No—sales from my company to the United States Government?

Q. Yes. A. No.

Q. If there had been any sales by your company to the United States, they would have been consummated and transacted through your Baltimore or Toledo office; would they not? A. Toledo, I would say.

Q. Toledo, you would say? A. Yes.

Q. You would have nothing to do with it? A. No.

Q. You did not have anything to do with them, did you? A. No.

Q. Now, these various regulations and bills for proposing legislation—

* * * * *

119 Q. —which might or might not affect your company, have to do with the over-all business of your company, did it not? A. That is right.

Q. In other words, it had to do with the manufacturing division, the sales division, and the administrative division? A. Conceivably, a labor regulation would, the Taft-Hartley Act.

Q. How many telephones did your whole office have during the year 1948?

The Board: Do you mean how many instruments or numbers?

By Mr. Updegraff:

Q. How many telephones, instruments? A. Do you mean the extensions?

Q. The number of telephones. A. I would say one in a room.

Q. That would be nine telephones? A. Yes.

Q. Did you have switch boxes attached so you could hold calls or transfer calls? A. Yes, I think that device is on there.

Q. You did not have a PBX board? A. No.

Q. How many phones did you have at your desk? A. One.

* * * * *

121 The Board: How many outgoing lines did you have?

The Witness: Four, I think, sir.

The Board: All of those on one number?

The Witness: No—in the telephone book, yes, but they have—

The Board: But they had consecutive numbers?

The Witness: They were in sequence, National 8412-13-14-15-16—

* * * * *

122 By Mr. Updegraff:

Q. There were no sales of tangible personal property to the United States by the petitioner in this case negotiated from your office at K Street, were there? A. No, sir.

Q. Do you know the purpose of listing the petitioner's local telephone number in the local classified business directory? A. I did not put it in there, so I do not know.

Q. My question is, do you know personally?

The Board: He said, "I do not know." His answer was "I do not know."

By Mr. Updegraff:

Q. Has the matter been discussed by you with your home office or any branch office? A. No.

Q. Have you received any requests from the home office or any branch office to provide those facilities? A. No.

Q. It was all done before you went there as manager; is that right? A. That is right.

Q. And you just continued it on as a matter of course?

A. That is right.

123 Q. Have you ever made visits in connection with your services for the petitioner at the local office in the District with respect to opposing any proposed legislation in Congress? A. No.

Q. Your district office is not in any way listed as a lobbyist in the Capitol? A. No.

The Board: Have you ever appeared in behalf of your company before any administrative officer of any government agency in an effort to influence regulations or actions?

The Witness: No.

* * * * *

124 Q. Now, I believe you testified, Mr. Thomas, that the various salesmen from the Baltimore branch visited the District branch on K Street after closing time, which closing time was 5:00 p. m.; is that correct? A. Normally.

Q. Now, you meant by that that the 5:00 p. m. closing time was the closing time for your office; is that not so? A. Yes.

Q. You did not mean to imply to the Board that every other business office in the District was closed at 5:00 o'clock? A. No.

125 Q. Did you remain there after 5:00 p. m. as a regular practice or did you go home at 5:00 p. m.? A. I remained there regularly.

Q. How long did you remain there? A. Usually until half past six.

Q. Why? A. Because the House of Representatives and the Senate usually closed long after 5:00, and I stay there until both Houses are closed, as a general thing.

Q. So that between 5:00 and 6:30 when you left, you did not know what the salesmen were doing in the way of making telephone calls, soliciting business by telephone, and so forth, did you? A. I did not inquire especially.

Q. You did not know? A. That is right.

Q. Well, didn't you testify that you had a service which provided that for you by teletype? A. What service?

Q. About Congress' activities. A. That is right.

Q. What would you do, just wait and read the teletype? A. Yes, and I still do.

Q. And then what would you do after you read it?
126 A. If there was any information of value, I would transmit it to my people.

Q. Do you know as a matter of fact, Mr. Thomas, that inquiries have been and were in 1948 received at the petitioner's branch office in the District of Columbia with respect to the manufacture and sale of its products in the District of Columbia? A. We received regularly inquiries with respect to it.

Q. What did you do with respect to those inquiries? A. Confirm them and refer them to the Baltimore office as a general thing.

Q. Has the District branch office of the petitioners quoted approximate prices to anyone contacting the local branch? A. The government from time to time, or some government office, will call up and ask us what is the approximate cost of a certain size of bottle or jar, for the purpose of including the item in a budget. That happens now and then, and some outsider will call and ask what does a pint jar cost or a quart bottle.

Q. On these last calls, various commercial concerns have called you likewise; have they not? A. Not commercial

concerns, but individuals—not a commercial concern, because if you wanted an approximate price of the approximate cost of a bottle of a certain size, I could give
 127 that information within 20 percent, 15 percent, but I would qualify it, and in the case of the Government asking for a budget quotation.

Q. The District branch of the petitioner has on those occasions discussed various specifications with prospective customers in the District, has it not, through its employees?
 A. Not a customer, but I might have discussed specifications with the Government asking for information but I never spoke authoritatively.

Q. But you did not? A. Yes, on one or two occasions, but I acted as the intermediary between ourselves and Toledo.

* * * * *

130 Q. I hand you respondent's exhibits A, B, and C for identification and ask you if they are not the personal property tax returns of the petitioner in this case filed with the District Government? A. In 1946?

Q. All three of them. A. This one, I signed apparently.

Q. That one is respondent's exhibit A? A. Exhibit A, in 1946.

Q. You signed that? A. That is my signature.

Q. Now, referring to Schedule C of tangible personal property, is your recollection refreshed as to the contents of the local office of the petitioner?

* * * * *

131 A. I said there were eight desks. I said there were nine here when I put this down.

Q. Well, is there any difference, or was there any difference during the calendar year 1948 as to the tangible personal property located in your K Street office as compared to the enumerated items in Schedule C of Respondent's Exhibit A? A. Between '46 and '48, the number of items were reduced.

A. They were reduced? A. Yes.

Q. Now, refer to Respondent's Exhibits B and C and tell the Board whether they were increased during those years. A. What are B and C?

Q. The fiscal period 1948 and 1949. A. Is there a list in here?

Q. I am referring you to Schedule C of Respondent's Exhibits B and C and asking you whether there had been any additions to the furniture and equipment of the petitioner at its K Street office in the District of Columbia since June 20, 1946. A. Well, I cannot tell by looking at this, sir, unless you speak of value. There is no itemization.

132 Q. Do you know, as a matter of fact? A. If there has been an increase?

Q. Yes. A. Between 1946 and 1948?

Q. Not between, but since June 20, 1946. A. Has there been an increase?

The Board: Not in value, but in items.

The Witness: To the best of my recollection, no.

By Mr. Updegraff:

Q. Has there been any decrease in the number of items? A. Yes.

Q. What was decreased? A. I cannot give you the details, but we shipped several items of furniture back to Toledo.

Q. When was that? A. It was prior, I would say between 1947 or 1948—I do not know.

The Board: What items?

The Witness: What items, sir?

The Board: Yes.

The Witness: Two desks that I know specifically.

* * * * *

Redirect Examination

By Mr. McKay:

Q. You said, sir, that occasionally in 1948—if I misstate your testimony, you may correct me—you acted as
133 intermediary between yourself, that is, between Toledo and the Government, with respect to certain inquiries made by Government agencies.

Will you tell us to the best of your recollection what was the nature of those inquiries to which you referred? A. I cannot recall any specifically, Mr. McKay. I can only give you a characteristic inquiry which is referred to Toledo.

Let me explain that so far as I know the Government is not a purchaser of empty bottles, but they do buy commodities that are packed in bottles and they have through the telephone book or some paper or other, they inquire of us as to what type of container they should specify to hold a certain acid, let us say, or the last inquiry I had was a developing fluid for X-ray films for the Veterans Administration.

I simply directed the inquiry to Toledo and they will give them a standard bottle which can be purchased from any glass manufacturer, which they can specify as being the container to be used in supplying that commodity.

Q. Now, sir, I will ask you whether in 1948 any commercial customer in the District of Columbia called you and attempted to order, or did order, any quantity of glassware from you? A. Again, Mr. McKay, I cannot remember
a specific instance, but it happens often enough for
134 me to assume that in 1948 I had several such inquiries.

Q. Now, just tell us what type of inquiry it was, what they would say and what you would say. A. Well, the most frequent inquiry we received is from housewives or women who have an idea that they can market some recipe in which they take a good deal of pride—it may be salad dressing or some other product of that sort—and they usually want to

know where they can get some jars or bottles in which to pack it.

Our standard answer is that this is not a sales office, that they can go to our Baltimore office, or better still, to the Atlantic Glass Company.

Occasionally it happens in connection with a drug item or a cosmetic item, and in that case, why I tell them to try the Washington Wholesale Drug Company, and that is usually the last I hear of it.

Q. Now, is that typical of the inquiries to which you referred on cross examination? A. Characteristic.

Q. What do you use that second teletype machine for that you referred to? A. I believe that all of our offices and factories are connected through an intercommunicating teletype system. I think the firm can take a teletype for our factory in San Francisco and put it on that machine
135 and it will reach there, although I do believe they are relayed through Toledo.

Q. What does your office use it for? A. We are part of the system. We use it almost daily for messages to Toledo that are more urgent than air mail but less urgent than long distance telephone.

Q. What sort of messages, sir? A. I might tell them at 2:00 o'clock that the Social Security Act will be passed this afternoon or that the dividend deductions have been excluded from the recent Tax Act—those are two teletypes I have put on recently.

Q. Now, at the time that these salesmen visited your office, of course when you were there, for the most part do you recall that you were with them during the period they were in the office? A. Well, Mr. Barnsley came in to see me.

Q. And you stuck with him? A. Oh, as a general thing, yes.

Q. And do you recall ever hearing any of these gentlemen do any sales business over the telephone while you were there? A. I cannot recall a single instance.

* * * * *

137 **Lewis W. Barnsley** was called as a witness by and on behalf of the petitioner and, after having been duly sworn, was examined and testified as follows:

138 Direct Examination

By Mr. McKay:

Q. State your full name. A. Lewis W. Barnsley.

Q. And what is your occupation, Mr. Barnsley? A. Currently?

Q. Currently and in 1948—well, in 1948, what was your occupation? A. Branch manager of the Owens-Illinois Glass Company, Baltimore territory.

Q. Where were your headquarters, sir, in 1948? A. 1809 First National Bank Building.

Q. Baltimore, Maryland? A. Baltimore, Maryland.

Q. And were you the branch manager during the entire period of 1948? A. I was.

Q. And what kind of an office was that? A. A sales office.

Q. And what territory did the Baltimore branch sales office cover? A. Maryland, Washington and Virginia.

Q. By "Washington" do you mean the District of Columbia? A. The District of Columbia.

Q. Now, sir, did you have other salesmen under
139 your direction? A. Three.

Q. And what are their names? A. E. A. Randlett—I had four, excuse me.

F. L. Rickenbacker, and Harry F. Wilkins, and Frank Jones, Jr.

Q. And did any or either of those men cover the Washington area, the District of Columbia area? A. Randlett, Jones and Wilkins. Rickenbacker did not.

Q. Rickenbacker did not.

Did you yourself do any selling in the Washington, D. C., area? A. Yes, sir.

Q. What products did you sell in 1948? A. Glass containers and enclosures.

Q. Whom did you report to? A. Toledo.

* * * * *

I reported to Mr. S. L. Reardon, general sales manager and vice-president of the company.

* * * * *

140 Q. Now, during 1948 where did you live, Mr. Barnsley? A. 105 Midhurst Road, Baltimore, Maryland.

Q. Did you maintain a residence in the District of Columbia in 1948? A. No, sir.

Q. Did you have an office in the District of Columbia in 1948?

* * * * *

A. No, sir.

Q. Do you know where Mr. Randlett and Mr. Jones and Mr. Wilkins lived in 1948? A. Yes, sir.

Q. Where did they live? A. Mr. Jones lived in Richmond; Mr. Randlett and Mr. Wilkins lived in Baltimore. In fact, one of them, Wilkins, lived in Towson, Maryland, just a suburb of Baltimore.

Q. To your knowledge, did either of these men have an office in the District of Columbia in 1948? A. They did not.

Q. Or a place of residence? A. No, sir, they did not.

Q. How frequently did Mr. Wilkins and Mr. Randlett visit the District of Columbia during 1948? A. 141 Probably once a week.

Q. And how frequently did you visit the District of Columbia during the year? A. About the same time.

Q. Now, was it your practice to stay overnight when you made these visits? A. No, sir.

Q. To your knowledge, did Mr. Randlett and Mr. Wilkins and Mr. Jones stay overnight? A. No, sir, not in the regular routine, unless there was some drug convention or something like that that may have kept them here, but that was unusual.

Q. I wish you would describe in detail the procedure which you followed in making your sales in the District of

Columbia. Tell us the whole procedure. A. Well, it was a one-day trip. We would leave in the morning and plan our calls, knowing who we were going to see and we were home at nights for dinner.

Q. Well, did you frequently travel with one or the other of the two men? A. Yes.

Q. And tell us, when you got to the District of Columbia—state, for example, you were going to sell to the
142 Doctor drove over here because of our customers being spread all over the area, and we would come through Takoma Park and see Doctor Pepper and Mr. Blakney, who was here. We would then cut across to Kenilworth Avenue and pick up Seven-Up, Pepsi-Cola and Try Me.

Q. What would you do in Mr. Blakney's office?

* * * * *

A. Sell him bottles.

* * * * *

Q. Now, sir, in making your sales to these various customers in the District of Columbia in 1948, what was your practice? Did you contact him personally? Did you solicit him by telephone? Just what was your practice, tell us, please? A. Well, it was a personal contact.

Q. And to the best of your knowledge, your subordinates in your office followed the same practice, did they? A. That is right.

Q. Were they so instructed? A. Yes, sir.

Q. Well, if you will, tell us how an order was made and how it was fulfilled. What were the steps taken under your company procedure during that period?

* * * * *

143 A. We have certain forms in our branch where we write it up and mail it to Toledo and not to the plant, because Toledo delegates which plant will service that order, and then—

The Board: You keep no stock in Baltimore?

The Witness: Sir?

The Board: You have no stock of goods in Baltimore?

The Witness: No, just a sales office.

Then, the order is transferred by Toledo to the plant and we get an acknowledgment back from the plant telling when they will make and ship it.

After that, we get an invoice, a copy—the customer, of course, gets the original and we get a copy of the invoice from Baltimore, and of course, copies go to the general office in Toledo.

By Mr. McKay:

Q. When is the order accepted and by whom? A. Toledo.

Q. And by whom? A. The interested sales division—I mean, we have a number of divisions—the sales manager of the division which it fits, whether it is food or—

The Board: Are those divisions divided as to product or geographically?

144 The Witness: No, by product, sir, like the food division, drug division, beverage and brewery division.

By Mr. McKay:

Q. Well, at what time in the steps which we have discussed was the order accepted? A. Well, when it cleared Toledo, that is when it would be accepted before it got to the plant, of course.

Q. Did you ever visit during 1948 the K Street office of the Owens-Illinois Glass Company? A. Yes, sir.

Q. During the course of the year 1948, give us an estimate as to how many times you made such visits. A. Oh, that would be hard to say. I would come to Washington—I came to Washington almost an average of about once a week, but I did not check in our Washington office every time I came, by any means. When I did, it was purely for social reasons, because I have known Mr. Thomas for a numbers of years and usually it was after 5:00 p. m. to just sit down and fraternize and go on home.

Q. Well, do you recall the frequency of your visits? Was it once every month, once every three months? A. It would average once a month, I would imagine.

Q. Now, you stated your purpose for making the visit was to fraternize and for social purposes. Did you state at what time of the day you usually made those visits.

145 The Board: He said 5:00 o'clock.

The Witness: Sometimes after 5:00 and sometimes around noontime I would have lunch with Mr. Thomas, but it was purely social.

By Mr. McKay:

Q. Do you know of your own knowledge the office hours of your customers in the District of Columbia in 1948?

A. No, because we never got in until after 9:00 o'clock, but I imagine it was 9:00 to 5:00.

* * * * *

Q. Now, were there any facilities in the K. Street office which were set aside specifically for the use of yourself and your men? A. No, sir.

Q. In the District of Columbia office? A. No, sir, there were not.

Q. Now, did you ever use these office facilities in 1948, any of them? A. Other than the only time they were ever used was when I checked in with my Baltimore office
146 every time I was in Washington sometime during the day by telephone and sometimes it was from my customer's office.

Q. You mean sometimes from the Washington office? A. Yes.

Q. And sometimes away from the Washington office? A. Yes, lots of times from a phone booth, and if I were downtown close by I would call my secretary in Baltimore sometime during the day.

Q. What would be the purpose of that call? A. Just to check in and see what was going on.

Q. Were those calls in any way connected with the sales you were attempting to make? A. Sometimes they were.

Q. In what respect? A. Well, we might have a rush order for a customer that I would want them to send a teletype to Toledo on. We have a teletype system in Baltimore open from 9:00 to 5:00.

Q. Did you ever attempt to make a sale from the K Street office in 1948? A. No, sir.

Q. To your knowledge, did any of your men ever attempt to make a sale from the Washington, D. C., office? A. They were not supposed to. They were supposed to go to see the customers.

147 Q. To your knowledge, did they ever? A. No, sir.

Q. Do you recall ever calling a customer or prospective customer from those offices in 1948? A. If I did, it was to make an appointment to see them.

Q. Did you ever write or telegraph them from that office in 1948, any of those customers? A. No, sir.

Q. Did Mr. Thomas or any of his staff ever attempt to assist you in making any sales to any customers here in the District of Columbia in 1948? A. No, sir.

Q. To your knowledge, did those persons ever assist or attempt to assist any of your men in making a sale? A. I do not think they did.

Q. Did you furnish Mr. Thomas with any information with respect to the prices of the Owens-Illinois Glass Company's products or any information relating to the products manufactured by the Owens-Illinois Glass Company in 1948? A. No, sir, none of us in our office did.

Q. Did you at any time tell a customer of the Owens-Illinois Glass Company in the District of Columbia to refer to the K Street office for any purpose whatsoever in 1948? A. No, sir. Very few people know that we ever had an office here.

148 Q. Did you give your customers instructions as to who they should get in touch with in case they wanted information? A. No.

Q. Did you ever tell them to call the Baltimore office?
A. Oh, yes.

Q. I will ask you what office of your company received the commissions on the sales made out of the Baltimore office to the people in the District of Columbia in 1948. A. The Baltimore office.

Q. And did that office get credit for those sales? A. Yes, sir.

Q. Were any of the selling expenses incurred by the Baltimore office in 1948 charged to the Washington, D. C., office? A. No, sir.

Q. Do you know how many customers the Baltimore branch had in 1948 in Washington, D. C.? A. Actual customers, I would say 20.

* * * * *

149 Q. Now, referring to the Doctor Pepper Company, which was a customer of the Owens-Illinois Glass Company in the District of Columbia in 1948, was the method by which you sold this customer products of the Owens-Illinois Glass Company typical of the method by which you sold products to all of the District of Columbia customers in that year? A. It was.

Q. Did you ever effect, or negotiate, or solicit a sale from the Washington, D. C., office in 1948? A. No, sir.

Q. To your knowledge, did any of your subordinate salesmen do it? A. I do not think they do.

* * * * *

Cross Examination

By Mr. Updegraff:

150 Q. Mr. Barnsley, all of the sales to the District customers were negotiated or secured by you and the salesmen from your office by personal contact; is that correct? A. That is right.

Q. All of those sales to District customers during 1948 were negotiated or secured in the District, were they not,

by you or your men? A. Other than U. S. Government sales.

Q. Well, I am talking about these 20 customers. A. They were, yes, you are right.

Q. They were all negotiated by you and your salesmen? A. That is right, by the Baltimore branch office.

* * * * *

151 Recross Examination

By Mr. Updegraff:

* * * * *

153 By Mr. Updegraff:

Q. Do you deny that you testified on direct examination in answer to Mr. McKay that the business obtained from District customers was solicited by "personal contact"? A. Well, I did not mean to answer it that way. Some of our business is gotten as I have just said, by mail and telephone from Baltimore.

Q. How much with relation to the whole? A. That would be hard; I am not in a position or qualified to answer that right now.

Q. And you came over to the District of Columbia, I believe you testified, at least once a week during 1948 and had personal contacts with the petitioner's District of Columbia customers.

What did you do? Take an example of one of the twenty customers and tell the Board just what you did with respect to your personal contact with that customer. A. Well, we will take Peoples Drug Store as an example.

The Board: Repeat that.

* * * * *

The Witness: I said we can take Peoples Drug Store as an example, a chain of retail drug stores that have their headquarters here and also have a pharmaceutical laboratory known as the Graham Remedy Company. We go in

and solicit the bottle business and take the orders and write them up.

By Mr. Updegraff:

Q. In other words, by soliciting the order you have a discussion, I suppose, with the purchasing officer at Peoples?

A. Yes, sir.

Q. And you would discuss prices, would you? A. Yes, sir.

155 Q. And you would discuss other things with relation to it, would you? A. Pertaining to what, sir?

Q. Pertaining to the order. A. Surely.

Q. In other words, then, in so far as that order was concerned, all of the negotiations you had with Peoples were here in the District during that call? A. That is right.

Q. Now, would that same course of procedure apply with respect to the remaining 19 customers in the District when you came over here and made personal contact with them? A. Yes, sir.

* * * * *

157 **Roy F. Smallwood** was called as a witness by and on behalf of the Respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Updegraff:

Q. Will you state your name, please? A. Roy E. Smallwood.

Q. Where are you employed? A. C. & P. Telephone Company.

Q. In what capacity? A. I am a commercial representative.

Q. Have you produced in response to a subpoena served upon you a record of the telephone facilities installed at the office of Owens-Illinois Glass Company, 1627 K Street, Northwest, Washington, D. C.? A. Yes, sir.

Q. Will you produce it, please?

158 Now, from those records, will you describe as briefly as you can what specific telephone instruments have been installed at that place?

* * * * *

The Witness: The equipment that has been installed consists of three incoming outside lines. That would be three telephone numbers incoming for outside calls to come in or inside calls to go out.

They also have four extensions, instruments, which would give them a total of seven telephones.

Then, there is associated equipment that has been installed to enable them to carry out their business so that they can pick up each of the seven telephones the three incoming lines. That would enable them to either answer calls when other lines are busy, or make calls when other lines are busy. In other words, it is a common push button set, you see.

There is associated equipment such as is necessary for that equipment to operate, such as holding features
159 and line equipment.

I can describe it in more detail, if you want.

By Mr. Updegraff:

Q. I wish you would, please. A. Well, they have illuminated sets—the illumination being that the keys are of lucite and by those keys being illuminated—

The Board: Let's confine the testimony to 1948.

By Mr. Updegraff:

Q. Mr. Smallwood, before you proceed further, will you state whether this equipment and the arrangement about which you are testifying existed during the calendar year 1948? A. Just give me one moment and I will be glad to see if that is true.

Yes, sir, this equipment was in in 1948—it was a little different type, but it accomplished the same purpose.

* * * * *

162 Q. Now, can you identify this book—

The Board: Do not go to all that trouble. Just offer the book.

Mr. Updegraff: I offer in evidence the October, 1950, issue of the Washington, D. C., Classified Telephone Directory of the Chesapeake & Potomac Telephone Company.

* * * * *

The Board: And I will suggest instead of putting the whole record in evidence you simply put in evidence page so and so and such and such, an entry, because when you or the glass company—or the case may go to the Court of Appeals and I do not think you would want the directory.

* * * * *

163 Mr. Updegraff: Very well, with the permission of the Board, I read into the record—

The Board: Subject to your objection, Mr. McKay.

Mr. Updegraff: —from the October 1950 issue of the Washington Classified Telephone Directory, published by the Chesapeake & Potomac Telephone Company, page 360:

“Owens-Illinois Glass Company, 1627 K, N. W., National 8412.”

The Board: Will you state whether that is ordinary type or black face?

Mr. Updegraff: That is ordinary type.

And on page 363 of the same book:

164 “Owens-Illinois Glass Company, 1627 K, N. W., National 8412,” in small type.

Also on page 363 in heavy black type:

“Insulux Glass Block,” and there is an advertisement there reading:

“American Structural Products Company is a wholly-owned subsidiary of the Owens-Illinois Glass Company. It has taken over the manufacture and sale of Insulux Glass Block and other Owens-Illinois structural products.

“Where to buy it. Sales office.

“American Structural Products Company, 1627 K, N.W., National 8412.

"DISTRIBUTORS

"Hires-Turner Glass Co.

"Rosslyn, Va. JAcKson 4-1000.

"United Clay Products Co.,

"Continental Bg., DIstrict 0787."

* * * * *

165 The Board: Have you shown what the listings
166 in the directory were in 1948?

Mr. Updegraff: No, I have not, but I understood it to be admitted they were listed.

The Board: See if you can get the admission. I am not sure it has been admitted.

Mr. McKay: I conceded that the corporate name of the Owens-Illinois Glass Company was listed in the classified telephone directory in 1948.

* * * * *

Richard S. Morgan was called as a witness by and on behalf of the respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Updegraff:

Q. State your name. A. Richard S. Morgan.

167 Q. You are employed by the District of Columbia government? A. That is correct.

Q. Will you please state your position and how long you have been so employed? A. I am an examiner in the Income and Franchise Tax Division of the Office of the Assessor, and have been with that division for approximately three years.

Q. Now, in connection with your District employment, did you sometime prior to the present time have any conversations with Mr. Walter G. Thomas, manager of the Washington, D. C., branch office of the Owens-Illinois Glass Company in connection with the possibility of their liability for District of Columbia franchise taxes? A. I did.

Q. Will you please state when that was and give the Board the gist of the conversation? A. The first discussion was when only myself and Mr. Thomas were present. That was on January 9 of this year and at that time we discussed the activities that were carried on at the local office and what use, if any, the Baltimore or outside salesmen made of the local office, and we also discussed at that time the listing the company carried in the classified section of the telephone directory.

168 Q. What did Mr. Thomas tell you with respect to the activities, if any, of the Baltimore salesmen working through the K Street office of the petitioner? A. Mr. Thomas told me at that time on January 9 that the salesmen did occasionally call at the local office and made calls to D. C. customers.

* * * * *

172 Mr. Updegraff: I offer in evidence for the sole purpose of showing that Mr. Lindower is the manager of the tax department of petitioner, as well as the American Structural Products Company, a letter from the Owens-Illinois Glass Company to the Assessor, dated August 3, 1949, and the letter dated April 12, 1950, from the American Structural Products Company to the Assessor.

The Board: Mark that the next number for identification.

Mr. Updegraff: I also offer for the same purpose a letter dated April 15, 1949, from the American Structural Products Company to the Assessor with respect to the 1948 franchise tax return.

* * * * *

173 Mr. Updegraff: May I ask Mr. Barnsley a question or two on that point to prove that Mr. Lindower—

The Board: Well, wait a minute. I am going to hold that he is with both tax departments and when you gentlemen have the leisure, if you find that is not the fact and will notify me, I will give you a chance to contradict that.

Mr. McKay: If we find it is not a fact, that is fair enough.

* * * * *

Lewis W. Barnsley was recalled as a witness by and on behalf of the Respondent and, having been previously
174 ly duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Updegraff:

Q. Have you, as the manager of the Baltimore office of the petitioner in this case, had any negotiations or dealings with the American Structural Products Company?

A. No, sir.

Q. Is there any part of the American Structural Products Company located by way of personnel or office equipment in the Baltimore branch office of the petitioner? A.

No, sir.

Q. Is there any business office anywhere else of the American Structural Products Company besides the District of Columbia that you know of? A. You are
175 speaking, you mean, of Washington or Baltimore, or what?

Q. In other words, besides the District of Columbia where American Structural Products Company has an office at the same place the petitioner has. A. I do not know where their offices are located.

Q. You do not know? A. No, sir.

* * * * *

Q. They do have other offices? A. Sure. There is no relationship between Insulux and bottles.

* * * * *

177 **Walter G. Thomas** was recalled as a witness by and on behalf of the Petitioner and, having been previously duly sworn, was examined and testified as follows:

Further Direct Examination

By Mr. McKay:

Q. Mr. Thomas, you heard the witness, Mr. Morgan, testify that he had a conversation with you on January 1, 1950, and during the course of that conversation that you told him that the Baltimore salesmen did occasionally make calls to the District of Columbia customers from the K Street office of the Owens-Illinois Glass Company.

I ask you, sir, whether you recall making such a statement to Mr. Morgan. A. I certainly do not recall, or had any reason to make such an explicit answer.

Q. Do you recall what you told him? A. I may
178 say that Mr. Morgan called me several times and he finally came in and had an extremely informal conversation in a group room downstairs in which he asked most of the questions that this gentleman did here, and he asked me about the use of the telephone.

I probably said that I assumed that he could call his customer, or anybody he liked, on the telephone, but I heard no such conversation.

I could not say in my own experience that I ever heard Mr. Barnsley speak to a customer. He would not do it in any case in my office.

Q. If he did it? A. I made the same answers there to the best of my recollection as I did to this gentleman.

Q. Does that answer hold true with respect to the other salesmen? A. I may say that the other salesmen were not on the intimate basis that Mr. Barnsley and I are. Whatever they did was out in the adjoining office and probably greeted me when they came in, but I had no close acquaintanceship with them, nor was I interested in their affairs, particularly.

Q. You do not know what they did? A. No.

I will frankly say that the telephone is there and we cannot stop them from using it in any case. What they did with the phone I do not know.

* * * * *

179 Cross Examination

By Mr. Updegraff:

Q. Mr. Thomas, did you at any time in 1948 ask any of the salesmen of the petitioner who came into your branch office in the District what their purpose was in coming into the office?

* * * * *

A. Have I asked them what they were coming in for, no.

Q. Did they ever tell you? A. No.

Q. You did not care one way or the other what they did; is that right? A. As long as their deportment was all right, it did not transgress anything that took place in my office.

* * * * *

185 **James E. Carr** was called as a witness for and on behalf of the Petitioner, and being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McKay:

Q. State your name, please. A. James E. Carr.

Q. What is your occupation, Mr. Carr? A. I am an attorney here in Washington, D. C.

Q. Are you one of the attorneys representing the Owens-Illinois Glass Company in this case? A. Yes.

Q. Will you state whether or not you personally took any action in connection with the payment of the Petitioner's 1948 District of Columbia franchise tax and the filing of the petition with the Board of Tax Appeals?

186 A. I did.

Q. Please state in detail what you did in connection with the payment of this tax and the filing of the petition? A. On about July 13 or 14, 1950, I received from Owens-Illinois Glass Company a letter with a check in the amount of \$2,224 and some-odd cents. This check was sup-

posedly to be in payment of a notice of assessment dated June 19—June 30, 1950. I noticed immediately that the time was beyond the ten-day grace period. I called Richard Morgan who is in the Income Tax Franchise Division with whom we had been discussing the liability of Owens-Illinois Glass.

* * * * *

Q. Where does Mr. Morgan work? A. He was with the Franchise Tax Division of the District of Columbia, Assessor's Office.

Q. Is he in the Assessor's Office of the District of Columbia? A. The two offices are right together; I am not sure whether it is the Assessor's office.

* * * * *

187 The Witness: Mr. Morgan is an employee of the District.

Mr. Morgan stated that the District of Columbia would not accept payment except if proper interest was given covering the time beyond the ten-day grace period. I therefore wrote the company and sent the first check back and told them of the need for payment of interest beyond the ten-day grace period. The Company wrote me on July 17, returning to me the original check for \$2,224 and some odd cents, plus an additional check in the amount of \$6.89.

* * * * *

Q. Mr. Carr, when did you receive those checks from the Owens-Illinois Glass Company? A. Either on July 18 or 19, 1950.

Q. I show you check in the amount of \$2,224.76 which is made payable to the Collector of Taxes, Washington, D. C., the payor being Owens-Illinois Glass Company.

* * * * *

Q. Do you recollect that check, sir? A. I do.

Q. Is that the check you are referring to? A. That is the first check.

* * * * *

188 Mr. McKay: Will you identify this, please, as Petitioner's Exhibit No. 2? And this second check as Petitioner's Exhibit No. 3?

(The two checks referred to were marked for identification as Petitioner's Exhibits 2 and 3.)

By Mr. McKay:

Q. Mr. Carr, petitioner's exhibit which has been marked for identification, Exhibit No. 2, for \$2,224.76, is that the check you refer to? A. It is.

Q. Petitioner's Exhibit No. 3 for Identification is a check for \$6.89. Is that the check which you received, sir? A. It is.

Q. Will you state what you did with these checks, please? A. After receiving these checks, I prepared a letter of protest to the Assessor, District of Columbia, protesting the—

* * * * *

189 (The documents previously marked for identification as Petitioner's Exhibits 2 and 3, were received in evidence.)

* * * * *

Q. Mr. Carr, you stated that you wrote a letter to the Assessor's office on July 19, 1950.

Before you answer, let me have this marked for identification as Petitioner's Exhibit 4 and 4-A.

(Letter with card attached were marked, respectively, Petitioner's Exhibits 4 and 4-A.)

* * * * *

Q. Mr. Carr, I show you the letter marked Petitioner's Exhibit No. 4 for Identification, with card attached marked Petitioner's Exhibit No. 4-A for Identification, and ask you whether this is the letter, whether the letter is the one to which you are referring? A. It is.

Q. Now, will you state what you did with this letter and what you did with the checks which have been introduced into evidence? A. I took this letter and the two checks on

the afternoon of July 19, 1950, came to the District Building and asked for Mr. Richard Morgan and handed the letter and the two checks to Mr. Morgan.

Q. Is this the same Mr. Morgan you referred to a moment ago ? A. It is Mr. Morgan who works in the Income Tax Franchise Division, District of Columbia.

* * * * *

A. At that time, we had a short conversation. As I recall, I asked Mr. Morgan if this was all right. He said that it was. He took the letter and the two checks and I asked him to please send us a receipt.

Then, after leaving Mr. Morgan—

Mr. McKay: At this point, your Honor, I would like to offer this letter in evidence with the—I will hold on to the exhibit, attached card—just Exhibit 4 I would like to offer in evidence.

Mr. Cheatham: I have no objection to its authenticity. I object to it on the ground that it does not show payment to the Collector of Taxes and is immaterial.

The Board: I overrule the objection.

(Document previously marked Petitioner's Exhibit 4 for Identification was received in evidence.)

* * * * *

Q. Now, Mr. Carr, did you have any other documents with you which you left with Mr. Morgan? A. I left with Mr. Morgan this letter with the two checks.

191 The Board: When you say "this letter" you refer to Petitioner's Exhibit 4?

The Witness: Petitioner's Exhibit No. 4.

* * * * *

A. I also left with Mr. Morgan the notice of assessment which accompanied the two checks. They were all clipped together, that is, the letter, the two checks and the notice of assessment from the District.

Q. Is that notice of assessment the notice which has been marked Petitioner's Exhibit 1, introduced in evidence?

A. It is.

Q. Now tell us what you then did? A. After leaving Mr. Morgan, I went to the clerk of the Board of Tax Appeals for the District of Columbia and gave to Miss Liberti the petition in this case.

The Board: What time of day was that?

The Witness: That was in the middle of the afternoon your Honor, as I recall, July 19, 1950.

By Mr. McKay:

Q. What did you do with the petition? A. Miss Liberti stamped it as having been returned. I took a copy of it and returned to my office.

* * * * *

Cross Examination

By Mr. Cheatham:

* * * * *

193 Q. Were you seeking information that everything was all right as to the amount of the payment owing, as to the amount of the checks? A. No; I felt convinced that the amount given to Mr. Morgan was proper. I had talked previously with Mr. Morgan on the telephone.

The Board: Who made the computation?

The Witness: They were made by Owens-Illinois Glass and made for a period up to July 20; so I knew that there was plenty of interest.

By Mr. Cheatham:

Q. Well, it is a fact, is it not, that you took Mr. Morgan's statement, if he said, "it is all right," to mean that the amount was all right and only the amount; is that
194 not right? A. No, sir; I handed Mr. Morgan the protest letter and the checks and so forth. As far as I was concerned at that time, after all we had been deal-

ing with Mr. Morgan in these conferences, that this payment—

* * * * *

Richard S. Morgan was called as a witness by and on behalf of the petitioner, and having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. McKay:

Q. Please state your full name. A. Richard S. Morgan.

Q. What is your present occupation? A. Examiner in the Income and Franchise Tax Division of the Assessor's Office.

195 Q. Was that your occupation on July 19, 1950?

A. Yes, that is right.

Q. Mr. Morgan, have you ever had occasion to accept checks in payment of D. C. Income and Franchise Tax; such payments have been made to you under protest? A. Yes.

Q. Have you had the occasion also to accept letters of protest in connection with such payment? A. Yes, I have.

Q. I will ask you whether or not that is something that occurs frequently? A. Well, it does occur; I do not know how frequently.

* * * * *

Q. Is it unusual for you to receive payment, to receive such checks? A. Yes, I would say it would be unusual.

The Board: But not unheard of?

196 The Witness: That's right, sir.

The Board: If you did it in this case, it would not be the first time?

The Witness: That is right, sir.

The Board: Nor the last.

The Witness: Nor the last.

* * * * *

Q. I will ask you whether you are acquainted with Mr. James Carr? A. I am.

Q. And calling your attention to the date of July 19, 1950, will you tell me whether you recall seeing Mr. Carr on that date? A. I could not swear to the particular date that I saw Mr. Carr.

Q. I show you this letter, Mr. Morgan, which has been introduced as Petitioner's Exhibit 4 and ask you whether you have ever seen that letter before? A. I have.

Q. Tell me where you saw it and when, if you remember and under what circumstances. A. From the date shown on the letter indicating that our division received the letter on July 19; it appears that that was the date that I saw Mr. Carr and on that day Mr. Carr tendered payment for the deficiency in tax plus additional interest, which we discussed on the phone.

Q. What tax was that in payment of? A. That was in relation to the tax deficiency for the year, 1948.

Q. For what tax year—I mean taxpayer? A. Owens-Illinois Glass Company.

Q. I show you a check which has been marked Petitioner's Exhibit 2 and received in evidence, and another check which has been marked Petitioner's Exhibit 3 and which has been received in evidenced, and ask you whether you recognize those checks? A. I do recall seeing them, yes.

Q. Tell us when you saw those checks. A. I saw those checks on the day that Mr. Carr called at our office to tender this letter and the bills of assessment and the checks covering same.

Q. Does this stamp, received July 19, 1950, Income Tax, have any significance other than the one you have just mentioned? A. Well, for our purposes it indicates the date that the letter or the correspondence was received by our office.

Q. Does it have any significance insofar as the running of interest is concerned? A. Yes, it does.

198 Q. What is that significance, sir? A. We would not add interest after that date.

Q. Now, Mr. Morgan, I show you a notice of assessment which has been previously introduced as Petitioner's Exhibit No. 1 and point out to you the initials R. M. on this exhibit and ask you whether they are your initials. A. That is right.

Q. Who put them there? A. I did.

Q. Do you recall when you did that? A. My initials would be put on the bill of assessment usually on the date that the bill is made out. I authorize the preparation of such bill and the bookkeeper prepares it and then I verify the amount shown on the bill for correctness.

Q. Do you recall having any conversation with Mr. Carr at the time he handed you this letter and checks? A. Nothing specific.

Q. Well, do you recall anything in a general way? A. My recollection is that Mr. Carr and I discussed the amount due in the payment of the tax, and interest, and we had had a previous conversation by phone concerning the additional interest that was due.

The Board: Who made the computation?

The Witness: I can't say definitely, your Honor, but I think there was a—Mr. Carr's office mentioned a figure and I believe we verified it.

199 The Board: When you say, "we," what I am trying to find out is not the individual, the particular individual, but whether that computation was made by the Collector or by the Assessor.

The Witness: It would be made by the Assessor, your Honor.

* * * * *

Q. I will ask you, what happens in your office after you receive checks and letters such as this? What becomes of them? A. Those checks and letters and the bills are usually referred to the bookkeeper.

Q. Are you familiar with the procedure from that point on? A. Fairly well, yes.

Q. I will ask you what it is; what is the procedure? A. In this particular case, due to the fact that additional interest was due, I would assume that the bookkeeper on the appropriate section of the bill would indicate the additional amount of interest due and the period for which it covered.

Mr. Cheatham: If the Board please, I move to strike the testimony of Mr. Morgan, what he assumed.

Mr. McKay: Tell us what the procedure is in general following the time that this leaves your hand and goes to the bookkeeper.

* * * * *

The Witness: I would normally refer a case of this kind to the bookkeeper so that she could verify the amounts tendered by the taxpayer and concerning the original deficiency and the additional interest and if she found that the amounts tendered were sufficient, so that the Collector's Office would accept payment. She would then in due course take the bills and the checks up to the Collector's Office.

The Board: Was the bookkeeper an employee of the Collector's Office or the Assessor's Office?

The Witness: The Assessor's Office.

201 By Mr. McKay:

Q. Mr. Morgan, will you give us the name of the bookkeeper, for the record? A. Mrs. Alva Arth.

Q. I will ask you whether under your procedure your office or Mrs. Arth always takes these checks to the Collector's Office on the same day that your office receives them? A. Usually, but not always. The Collector's office closes at 3:45.

The Board: At what time does your office close?

The Witness: 4:45, your Honor.

By Mr. McKay:

Q. Do you or do you not know personally what happened to these checks after they left your hands? A. No, I do not.

* * * * *

Cross Examination

• • • • •
 203 By Mr. Cheatham:

Q. Mr. Morgan, the bookkeeper to whom you refer, does he or she or the various employees that compose the so-called bookkeeper have anything to do with records for the Collector of Taxes of the District of Columbia? A. Not that I know of.

The Board: I do not know what the question means.

Mr. Cheatham: Does the bookkeeper keep any records for the Collector or does he keep records for the Assessor?

The Board: That is not what you asked him.

204 Is that what you understood?

The Witness: That is the way I answered it, sir.

By Mr. Cheatham:

Q. The bookkeeper to which you referred does keep records for the Assessor of the District of Columbia? A. That is right.

Q. Have you ever been appointed by the Collector of Taxes of the District of Columbia to receive money for the Collector? A. No, I have not.

Q. Do you know whether anyone in the Assessor's Office including the Assessor has been appointed by the Collector to receive any payment of taxes for the Collector of Taxes? A. I could not answer that question. -

Q. Do you recall whether or not you said to Mr. Carr at any time during his conversation with you on or about July 19, 1950, as to whether or not you said, all right, or that things were all right? A. I believe the general conversation concerned the amount tendered and it appeared that the amount tendered was sufficient.

Q. Did Mr. Carr at any time converse with you concerning whether you were a proper agent to pay the money to? A. No.

The Board: Did you express any reluctance to
205 take the money?

The Witness: No sir.

* * * * *

Q. After you delivered the two checks, Petitioner's Exhibits 2 and 3, to the bookkeeper, do you personally have any knowledge of what was done in connection with the payment by means of those two checks from that time on? A. No, I didn't.

The Board: You gave them to the bookkeeper?

The Witness: That is right.

* * * * *

207 By the Board:

Q. When a person has a tax bill, income tax bill, upon which interest has to be calculated, and he goes to the Office of Collector of Taxes to make payment, what is the usual procedure; does the Collector compute the interest? A. If the Collector's representative does know that the period in which no additional interest will be computed has expired, it is my understanding that the Collector's Office tells the taxpayer to go down to the particular section, the individual or Corporation Section, and have the bookkeeper in that section compute the additional interest.

Q. If the face of the bill is paid and that is all that is owing, the Collector takes it, does he not? A. Yes, sir.

Q. Why did you receive the payment instead of telling the taxpayer or his attorney in this case to go up and
208 pay it to the Collector? A. Well, more of a convenience to the taxpayer, sir, than anything else. We do receive these payments and the bookkeeper processes them, and in this particular case, the bookkeeper would be concerned with the matter because additional interest had to be computed and that information would have to be shown on the bill before payment could be made to the Collector.

* * * * *

208 **Guy W. Pearson** was called as a witness by and on behalf of the Respondent, and having been first duly sworn, was examined and testified as follows:

Direct Examination

209 By Mr. Cheatham:

Q. Please state your full name. A. Guy W. Pearson.

Q. What is your official capacity with the District of Columbia? A. Collector of Taxes for the District of Columbia.

Q. Do you recall approximately how long you have held that position? A. Since the first of December, 1940.

Q. Mr. Pearson, as Collector of Taxes, have you at any time since you have been the holder of that office officially authorized the assessor or anyone in his employ to receive payments of taxes as an agent for the Collector? A. Not to my knowledge.

Q. Could anyone have done it for or on your behalf without your knowledge? A. I do not believe so. I am trying to think of the Committee on Special Assessment Appeals, but that would not be an interpretation of accepting money on behalf of the Collector, no. I cannot conceive of a case.

Q. Do you always accept checks or do you have occasion to refuse checks? A. Under the normal process of business, we accept all checks. There are some few cases by reason of their demonstrated action in giving us—

210 The Board: Elasticity, you mean?

The Witness: Elasticity; that have by repeated action given us bum checks, bad checks or otherwise defective checks in payment of an obligation; we have through cooperation with the various agencies when such people are billed, there is a statement on there that only cash, certified check, or money order will be accepted in payment of this account.

By Mr. Cheatham:

Q. Do you interpret your authority as a matter of practice to be that you are authorized to accept only cash as pay-

ment of the tax? A. No; I might answer this way. In numerous cases years ago we had up before the Corporation Counsel, it was the consensus of opinion that I was not really required to accept a personal check in payment of a District tax if I had any reason not to accept that check.

* * * * *

Cross Examination

By Mr. McKay:

Q. Then I do understand that you do accept checks in payment of the District of Columbia taxes? A. Generally speaking, yes.

The Board: Actually, you would find it rather awkward if taxes were all paid in cash?

211 The Witness: Quite so.

By Mr. McKay:

Q. Referring to situations where taxes are paid under protest, Mr. Pearson, do you know or do you not know that as a matter of fact that it is not unusual for the Assessor's Office to receive such checks from taxpayers or their representatives? A. Quite true.

Q. That is a general practice, is it not? A. To receive a check?

Q. Yes. A. Right. That is quite the practice.

Q. And you have never informed the Assessor's Office that they should not do this? A. To this extent: We have advised the Assessor's Office not to hold those payments. We cannot do anything about the Assessor receiving a check by mail under protest. But it is good office practice and between the auditor and my office and the Assessor's, the auditor many times reports to the Commissioners, have criticized officers for holding checks or holding any types of payment, and to get around that part of it, we have actually accepted and held custody of such checks pending action by the Assessor.

* * * * *

212 The Board: Suppose the taxpayer goes down to the Assessor's office to have the interest computed. What is the practice then?

Does he leave the check?

The Witness: Invariably the taxpayer brings the check back to the cashier and pays it.

The Board: Do you know of any case where he has left it with the Assessor?

The Witness: No.

Judge, let me mention this: As you know, we have certain closing periods down there. A person will come in at 4:00 o'clock. We are closed to the public. We are in there working but we are closed. There have been occasions where the Assessor's employee has brought that bill in to pay it. The person had to leave or could not wait or something. That is a rare exception but technically that has happened. That person can give no receipt or anything but

213 it is merely acting for a taxpayer who came after we were closed and the taxpayer could not get in there but the Assessor's employee could.

The Board: At what time does your office close?

The Witness: 3:45 p. m. Monday through Friday.

By Mr. McKay:

Q. Well, maybe I misunderstood an earlier answer, sir. I believe I asked whether you knew as a matter of fact that in situations where taxes are being paid under protest, and where previous dealings have been with the Assessor's Office, that it is not unusual for the taxpayer to either mail the check in to the Assessor showing it with a letter showing payment under protest or have a representative bring it in with a letter showing protest under—payment under protest. A. That is done. It is the exception rather than the rule but the Assessor's Office gives him no receipt for it, no receipt or processes no payment whatsoever.

Q. Have you ever advised the Assessor that he is not to undertake such a procedure; that he is not to do that? A.

No, not generally, except as I stated in the audit of our accounts by the auditor, he comes to a desk and sees an employee holding checks or money orders, and it is wrong. In a cooperative attitude between us, the Assessor has been advised that he must not hold those things, to bring them in to the office, let me have physical custody of them pending the determination of the payment.

214 The Board: We are not talking about that kind of a case. We are talking about the kind of case where the Assessor has made the necessary computation and the tax is ready to be paid and then the question is, is it proper or is it unheard of, unusual, or customary under those circumstances for the check to be delivered to the Assessor.

The Witness: No; that is proper; that is done. I would say it is the exception. Those are special cases.

The Board: But not unheard of?

The Witness: Oh, no.

By Mr. McKay:

Q. I understand that you said that sometimes you tell them to get checks up to your office as soon as possible. With that exception, have you ever advised the assessor not to receive checks under the circumstances we have described? A. No, I have not.

Let me explain this: There is nothing I can do as to the action by the Assessor in him receiving a check or a taxpayer leaving a check with the Assessor. He has one jurisdiction; I have one jurisdiction.

Now, before any receipt can be rendered the payer, a bill has to be prepared and presented to the Collector's Office.

Now, that Assessor's employee, the taxpayer could come in and leave a check with him and leave. There is no
215 receipt issued at that time. The Assessor's employee would prepare a bill and bring it up or send it up by messenger and pay it. I cannot do anything about that. I would rather have the taxpayer pay it because there may

be a question about payment that I would want to deal directly with the taxpayer.

Q. You are, I take it, familiar with the procedures in the cashier's office? A. Yes, I am.

Q. And I take it that when a notice of assessment is stamped on a certain date, it means that the particular notice of assessment was brought to the cashier on the particular date shown, is that correct? A. Not necessarily.

Q. It would not be any later? A. It means it was received in the office on that date.

Q. This date there shows July 20. That is the date it was run through the stamping machine? A. That is the date it was processed by the cashier, that is correct.

Q. And the notice could not have been brought up any later than that date? A. No, definitely.

Q. It could have been brought up earlier? A. It could have been.

The Board: Under what circumstances?

216 The Witness: By mail, by actually being brought up.

The Board: Assume this check or these checks had been brought up on the 19th. Is it conceivable that it could have been stamped on the 20th?

The Witness: Definitely not, unless it was after 3:45. This is a small technicality but it happens. We close on the minute. When we close the cashier's machine is locked. He proceeds with his settlement. It may be a simple settlement. He may finish in ten minutes. An employee for the Assessor's office would come to the chief cashier. A man would say, the door is closed, but you can get this processed. It was the 19th, but the cashier's stamp has been turned over and it would be the 20th on his receipt.

The Board: Does your paid stamp indicate the time of day?

The Witness: No; date only.

* * * * *

Redirect Examination

* * * * *

217 By Mr. Cheatham:

Q. Is it proper to make a payment of taxes by leaving a check with the Assessor? A. No.

Q. Do you consider for purposes of recording a paying as being made that it has been made, that is, before a check reaches your custody, the custody of your office? A. It is not possible to process a payment without check, money order, or currency; that is physically impossible.

Q. You would have no objection if the pound master received a check from the taxpayer and brought it to you together with a proper bill and made a payment of the taxes, would you? A. That is quite customary.

Q. For the pound master to do that? A. Yes.

218 The Board: It is almost essential, is it not?

The Witness: Certainly.

The Board: If a man goes to the pound which is in the Southwest to redeem a dog, it would be nasty to make him come back to the District Building to pay the tax.

The Witness: We have had that question up. We had quite a settlement about it, but the Commissioners agreed that my policy should be that I could not inconvenience the public like that. After all, the pound master issues no receipt. The public trusts him by leaving the payment with him. He brings it up there. They are serially numbered. I give him a receipt for what he turns in and we issue another receipt for the taxpayer. That is a little exception to our general rule.

* * * * *

By Mr. Cheatham:

219 Q. If a person leaves money with the Member Sole of the Board of Tax Appeals, in payment of his taxes, and the Member Sole brings it to your office, you have no objection, do you? A. I could not have any.

Q. Does the Assessor have any more authority to act as your agent than the Board of Tax Appeals has? A. No, indeed.

Q. Have you ever authorized the Member Sole of the Board of Tax Appeals—

The Board: Let us not talk about the Board of Tax Appeals; let us talk about the Assessor.

Mr. Cheatham: May I have the last answer to my question?

The Board: No; I will strike it out.

* * * * *

220 **Alva Arth** was called as a witness by and on behalf of the petitioner, and being first duly sworn, was examined and testified as follows:

Direct Examination

221 Q. Please state your full name. A. Mrs. Alva Arth.

Q. Your present occupation? A. I am a clerk-bookkeeper in the Income and Franchise Tax Division of the Assessor's Office in the District of Columbia Government.

Q. Was that your occupation on July 19, 1950? A. It was.

Q. Mrs. Arth, would you please state whether you ever had the occasion or have had the occasion to take from your office to the Collector's Office checks and notices of assessment relating to the payment of the D. C. Franchise Tax which payment has been made under protest? A. Yes.

* * * * *

222 Q. And with what frequency have you done that?

A. I do that at any time that I receive such checks or bills or that are paid under protest at my desk.

* * * * *

Q. Is that unusual for that to happen? A. It is not too unusual.

* * * * *

Q. Have you ever had the occasion to take checks and notices to the Collector's Office in situations where the tax has not been paid under protest? A. Yes, frequently.

Q. How frequently? A. Practically every day.

Q. How many would you say you average a day? A. It would depend on a certain period of the month with which you were concerned. If it were around the 15th of
223 the month when the tax returns are received, I would probably average a great deal many more than say the last or the first of the month.

The Board: How would those checks have come in, by mail or in person?

The Witness: Those checks would come in, so far as I would know, by mail, although occasionally people will bring them in in person.

The Board: Do they hand them to you?

The Witness: Yes.

By Mr. McKay:

Q. Around the middle of the month, would you average as many as 25 a day? A. I am concerned not only with just the bills such as you are referring to here. I am also concerned with the actual tax return itself to which is attached check and I would have a great many more than that on certain days of the month.

Q. Tell us exactly what you do, Mrs. Arth, when you get such a check and such a notice here after you have received it? A. Are you referring to a deficiency bill which has already been prepared and sent out to our office?

* * * * *

224 Q. I show you Petitioner's Exhibit 1 and I am referring to a situation where you have received a notice of assessment similar to this and a check and I ask you what you then do? A. If I received the check and the bill, I would take it upstairs to the Collector's Office and pay it. And then I would receive a receipt from the clerk or which we mail to the taxpayer.

Q. Do you always take the check and bill to the Collector on the same day that you receive it in your office? A. No, sir.

Q. Is it or is it not unusual for you to hold it beyond the day that you receive it? A. It is not unusual. You could not possibly process the work that you would have passing over your desk in an actual day to day manner.

Q. Could more than one day go by? A. Yes.

Q. What would be the longest period of time? A. 225 I couldn't say.

Q. Two or three days, maybe? A. It could possibly be two or three days.

The Board: May I interrupt you for a minute?

Suppose somebody came in on the 15th of April and wanted to pay an income tax and handed you a check and you knew that unless the check was paid that day there would be additional interest. There would be, wouldn't there?

The Witness: No, sir. If they came in to our office with a check and a bill and it was due on the 15th of April and we received it as of the 15th of April, we would not consider there would be any additional interest.

The Board: Would you tell the taxpayer that unless he took it up to the Collector's Office, on that very day, he would have to pay interest?

The Witness: No, sir.

The Board: You would receive payments, would you, both when it was necessary for an interest computation to be made as well as when it was not?

The Witness: Yes, sir.

By Mr. McKay:

Q. This is Petitioner's Exhibit 4-A for Identification, Mrs. Arth, which was attached to Petitioner's Exhibit 4 and

I will ask you whether you recognize this card? A. 226 Yes, I recognize it.

Q. What do you recognize it as being? A. I recognize it as being a note from me telling me where to mail

the receipt to. Evidently they wanted the receipt mailed to an address which would have been different than what would have shown on the bill.

Q. Whose writing is this? A. That is my writing.

Q. I am referring to a note which says, mailed 7-20-50. That is your writing? What does that indicate? A. That would indicate that I had put the receipt in an envelope and have mailed it.

Q. On that day? A. On that day, that is right.

Q. You don't have any knowledge about this specific paper? A. Very vaguely.

Q. Tell us what you remember. I didn't know you had any knowledge at all. A. The only thing that I remember, and I am not even positive that it was this particular instance that Mr. Carr was in here about, but I can vaguely remember something concerning it, the additional interest which was due on this particular deficiency, and it does seem to me that he had come in to the office, I believe
227 after the Collector's Office closed. But I am not positive about that.

* * * * *

Cross Examination

By Mr. Cheatham:

Q. Mrs. Arth, do you keep the Assessor's books for any type of tax other than corporation franchise tax? A. No, sir.

Q. Is it not a fact that where persons come to the office that you are in, and leave checks by hand, that they are not left with you but with the examiners or Mr. Richardson? A. No, sir.

Q. The persons from outside representing the taxpayer come in and see you?

The Board: She did not say they just came in to see her.

The Witness: They have come in to see me, yes.

* * * * *

Q. On July 19, 1950, or a few days before or a few days after, you did not have any large number of checks, income tax bills and checks being received at your office, did you?

A. Yes, I did.

228 Q. At that time? A. Definitely. That is the busiest time of the month for me, around the 15th of the month.

Q. Are you speaking of every month or only of April?

A. I am speaking of every month and of course it is more so April 15, from then on for another month or so.

* * * * *

By the Board:

Q. Referring to Petitioner's Exhibit No. 1 which is in front of you, did you make a computation of interest on that bill? A. I do not remember whether I made it or whether the examiner made it in this instance.

Q. That is part of your job? A. Yes, it is part of my job; but it works both ways sometimes.

Q. Sometimes he does it and you don't have to do it? A. That is correct.

Q. You don't check them if somebody else makes them? A. Not if I consider that they are a reliable person.

Q. Can you tell by the typing of that interest item whether you did it? A. Well, it looks as if it were
229 done at my typewriter but I wouldn't like to say definitely because I am not the only one that uses my typewriter, either.

* * * * *

234 Further Direct Examination

By Mr. McKay:

Q. Mrs. Arth, do you remember taking these specific checks and this specific notice of assessment up to the Collector's office? A. No, sir; I do not remember the specific checks. I could hardly be expected to.

The Board: I would not expect you to remember it, but do you have any means of ascertaining at what time of day on July 19, you took the checks up to the Collector's office?

The Witness: Evidently I did not take it up on the 19th.

The Board: The collector testified that if a check came in after quarter to four, it would be stamped the next day.

The Witness: That is right.

The Board: So don't draw inferences from that stamp.

Do you keep a record showing what time of day you take checks upstairs?

The Witness: No, sir.

The Board: Do you have any particular time of day when you do take them up?

The Witness: No, sir.

235 The Board: So it could be in the morning, the middle of the day, or the afternoon.

The Witness: Yes, sir.

The Board: Do you keep or have any record of what checks are left over at the end of the day?

The Witness: No, sir.

The Board: And I suppose—correct me if I am wrong—the intervals between your getting the checks and taking them upstairs depends on how busy you are on a particular day?

The Witness: That is correct, sir.

* * * * *

246 Mr. Walker: If the Board please, this is on the Government's motion to correct the filing date on the cross petition for review by the United States Court of Appeals, District of Columbia circuit, the filing date shown on the cross petition, June 1, 1951.

* * * * *

Judith A. Wilson was called as a witness by and on behalf of the respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

247 By Mr. Walker:

Q. Please state your full name. A. Judith A. Wilson.

Q. Where are you employed? A. The office of the Corporation Counsel.

Q. Are you a clerk-stenographer in that office? A. Yes.

Q. Assigned to what division and what room? A. The Tax Division.

Q. And what room? A. 323.

Q. Is that the room in which Mr. George C. Updegraff and myself are located? A. That is right.

Q. Were you so employed and so located on the afternoon of May 31 last? A. Yes.

Q. Is it among your duties to receive petitions and cross petitions and other pleadings served upon the Corporation Counsel in that room? A. Yes, it is.

Q. Now, directing your attention to the afternoon of May 31 last, did you have occasion to receive a petition for review in the case of Owens-Illinois Glass Company? A. Yes.

248 Q. Would you tell us the circumstances, giving the time, approximately, in which you received such petition? A. Mrs. Liberti delivered the petition to me about 4:50—

The Board: Who is Mrs. Liberti?

The Witness: The clerk of the Board of Tax Appeals—at my desk. At that time, Mr. Cheatham came in the office just about the time that Mrs. Liberti went out.

The Board: What time was she there?

The Witness: 4:50. Knowing that it was in the case of Owens-Illinois, I called Mr. Cheatham's attention to it and informed him that the petition had been filed. At that time he looked at it and said that we would have to make some sort of an answer or cross petition and asked me to get in touch with Mrs. Liberti by telephone.

By Mr. Walker:

Q. Did you do that? A. Yes. I tried immediately to call the extension that she had, but there was no answer. I let it ring about, oh, 10 or 12 times.

Q. You called the extension number of the Board of Tax Appeals and received no answer? A. Yes.

The Board: You said 10 or 12 times?

The Witness: I let it ring, yes.

Mr. Walker: You may examine.

* * * * *

251 **George C. Updegraff** was called as a witness by and on behalf of the respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Will you please state your full name? A. George C. Updegraff.

Q. Where are you employed, Mr. Updegraff? A. I am employed in the office of the Corporation Counsel for the District of Columbia as Assistant Corporation Counsel and am chief of the Tax Division of that office.

Q. Now, were you so employed on May 31, last? A. I was.

Q. Do you know Mrs. Wilson? A. I do.

Q. Did there come a time on May 31 when Mrs. Wilson gave you a petition for review filed in the case of Owens-Illinois Glass Company? A. Yes.

Q. Do you recall about what time that was? A. That was approximately 5:15 p. m. on May 31.

252 Q. What did you do, if anything, with respect to that? A. I immediately directed that a cross petition for review be prepared and filed in the case, because we had thoroughly considered the question which had been decided against the District involving the claim for refund of \$1,000, and had come to the conclusion previously that

we would not file a petition for review as to that unless the Owens-Illinois Company filed a petition for review, in which event we would file a cross petition.

Q. In other words, that was the Corporation Counsel's instruction to you in that particular case? A. That was my recommendation, approved by the Corporation Counsel and the Assessor.

Q. Now, getting back to that, you say that you directed that a cross petition be prepared. To whom did you give that direction? A. To Mr. Cheatham and Mrs. Wilson.

Q. And did Mr. Cheatham later prepare and present to you such a cross petition? A. He immediately did so and it was finished about 5:40. Before the petition was finished, I called the Honorable Lawrence Koenigsberger, sole member of the Board of Tax Appeals, who is presiding today, and talked with him on the telephone and informed him of the facts I have just testified to with respect to our receipt of the petition at a late hour, and that we intended
253 to file a cross petition for review.

I talked with the Judge in the light of his prior decision in the case of *Santander v. the District of Columbia*—I don't recall the docket number—where the Board of Tax Appeals had held that a petition which had been placed between the door knob and the door jamb after the Board of Tax Appeals had closed, by a building guard and an attorney, constituted a reasonable filing on the last day. Being overly cautious, I wanted to notify the Judge that we were going to slip the petition under the door, and he told me when I informed him of that—he said: "You have done so."

Q. That was the member of the Board of Tax Appeals?

A. That is correct.

Q. Now, after that conversation with the Member sole of the Board of Tax Appeals, did you or Mr. Cheatham, or either of you, do anything with respect to carrying out that purpose? A. About 5:15 p. m. on May 31, Mr. Cheatham and I came down personally to the Board of Tax Ap-

peals, and Mr. Cheatham slipped the petition, with the necessary number of copies required by the Board rules, under the door leading to the Board of Tax Appeals.

Q. Mr. Updegraff, you said: "About 5:15." I notice your affidavit says in this case about 5:45. Would you like to correct your testimony? A. 5:45, that is right.

254 When I first learned of it, it was 5:15. When the petition was filed, it was 5:45.

Q. On May 31? A. May 31.

Q. And you and Mr. Cheatham in the company of each other brought the cross petition to the Board of Tax Appeals and slipped it under the door? A. Mr. Cheatham did it and I observed him do it.

I also instructed Mr. Cheatham to call the Clerk of the Board of Tax Appeals, Mrs. Phyllis Liberti, at her home and notify her that he had so filed the petition.

Q. Now, Mr. Cheatham is an Assistant Corporation Counsel of the District of Columbia? A. He is an Assistant Corporation Counsel for the District of Columbia in the Tax Division of that office, and was counsel in the present case.

Q. He was trial counsel? A. He was trial counsel.

* * * * *

The Board: What happened, if you know, in the interval between the service of that document on Mrs. Wilson and 5:15?

The Witness: I don't know from my own knowledge. I was in Mr. Lynch's office, another Assistant Corporation Counsel in the Tax Division, conversing with him about another case when Mrs. Wilson received it. I did
255 not get back into my office until 5:15.

* * * * *

Eunice Bronson was called as a witness by and on behalf of the respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

Q. Now, Mrs. Bronson, will you please state your full name? A. Eunice Bronson.

Q. Where are you employed, Mrs. Bronson? A. Second floor of the building, the Division of Tax Appeals and Personal Tax.

Q. You are in charge of cleaning those rooms? A. Yes.

Q. And were you so employed on May 31, 1951? A. No, I wasn't here on May 31. I was on vacation. I came on on the first.

256 Q. You came on when? A. The first day of June.

Q. About what time did you come on? A. I came on—it is usually about between 3:20 and 3:30, 3:25 and 3:30. My card shows that.

The Board: Morning or afternoon?

The Witness: Morning.

The Board: How do you get up so early?

The Witness: I just set my alarm.

By Mr. Walker:

Q. Did you set your alarm and get up that early and come to work that early on the morning of June 1st last? A. Yes, my card shows that.

Q. What did you do after you got here? A. The first thing I do—three of us have to use the key—well, I bring the key with me and the first door I unlock is 209, because my work goes down there and goes all around, and I put the key in the ladies rest room for the next person.

As I opened the door of 209, there was a piece of paper, a few sheets, fluffed up on that runner, so I picked them up and just glanced over them and I saw it was something concerning a thousand dollar suit concerning some Illinois company, so I placed it on that table, on that desk which is sitting the nearest one to where I found it.

257 Q. That was within a few minutes after you came to work that morning? A. Yes, it was. I came

straight in—I don't undress or do anything. I got on the elevator and came up on the back elevator. I walked around here and had the key in my hand and unlocked the door.

Q. It certainly wasn't any later than 4:00 o'clock? A. It wasn't 4:00 o'clock. My time card shows that. I don't do anything but unlock the door the first thing, and then put the key in and go in and change my dress. I unlock the door the first thing.

Cross Examination

By Mr. Carr:

Q. This happened on June 1? A. Yes, it was Friday, the 1st.

* * * * *

Phyllis R. Liberti was called as a witness by and on behalf of the respondent and, after having been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Walker:

258 Q. What is your name? A. Phyllis R. Liberti.

Q. Where are you employed? A. Board of Tax Appeals.

Q. Were you so employed on June 1, 1951? A. Yes.

Q. Were you so employed on May 31, 1951? A. Yes.

Q. Now, Mrs. Liberti, as clerk of the Board of Tax Appeals, is it among your duties to serve or cause service to be made of petitions and cross petitions for appeal? A. It is my duty.

Q. Do you recall on the afternoon of May 31, 1951, of a petition for review being filed in the case of Owens-Illinois Glass Company v. District of Columbia? A. Yes, it was.

Q. Do you recall approximately what time that petition was filed? A. Mr. Carr brought it in at 4:30.

Q. And what did you do, if anything, with it? A. Well, I stamped it immediately and docketed it and Mr. Carr stayed around for a few minutes and talked about the record, and after that I brought it into the Judge and the Judge asked me if I had served the Corporation Counsel and I said, "No." He said, "Serve it immediately," and I did.

259 I looked at the clock here and it was just about three or four minutes before a quarter of 5:00.

Q. And then what did you do? A. I went upstairs and took it in and put it on Mrs. Wilson's desk.

Q. And was Mrs. Wilson there? A. Yes, she was sitting there typing.

Q. That was approximately what time? A. Well, it was 4:45, because I waited about a minute for the elevator, and one of the elevators was out of order, so I walked up the steps.

Q. Now, after you left Mrs. Wilson's office, what did you do? A. I came right back here.

Q. How long did you stay here on the afternoon of May 31? A. I was here until 5:00 o'clock.

Q. You were here until 5:00 o'clock? A. Yes.

Q. What is the time that you usually close the office of the Board of Tax Appeals, that is, the Clerk's office? A. 4:45.

Q. Now, directing your attention to the morning of June 1, 1951—

The Board: Before you get off of that, I will ask a question.

260 Why did you stay until 5:00 o'clock on this particular day?

The Witness: Well, Mrs. Jones and I were here until 5:00 o'clock. As a matter of fact, she was here after I left because I had some other work to finish up. As a matter of fact, you were here, too, Judge, until about five minutes of 5:00.

The Board: Did you notice the clock in Mrs. Wilson's office when you were up there?

The Witness: I can't recall that, Judge.

The Board: Have you had occasion since then to compare the clock in this office with the clock in Mrs. Wilson's office?

The Witness: Yes.

The Board: When was that?

The Witness: Tuesday afternoon I had a notice of hearing to serve the Corporation Counsel and I went upstairs and it was exactly 4:45. When I left here it was just about twenty minutes of. It didn't take me five minutes to get up there.

The Board: Was that Tuesday of this week?

The Witness: Yes, the day before yesterday.

The Board: June 18, that would be.

The Witness: The day before yesterday, the 19th of June.

By Mr. Walker:

Q. On the 31st of May, 1951, did Mrs. Wilson or
261 Mr. Cheatham or Mr. Updegraff or anyone call you with respect to that petition? A. Mr. Cheatham called me at home that evening. I would say it was about 6:30. He told me that he had called me at the office at about ten minutes or five minutes of 5:00 and I at that time told him that I was here and he said that Mr. Updegraff had called the Judge at his home saying that they intended to file a cross petition and that he had told me that he had put the petition at the door knob there because nobody was here at the time.

Q. Now, then, on June 1, 1951, what time did you come to work? A. Well, I came in at 8:20 that morning.

Q. Did you find any papers on any desk other than those that had been filed the day before? A. There was a petition for review filed by your office on there.

Q. Was it a cross petition? A. A cross petition for review filed by the District.

Q. That was on the first desk as you come in to the right? A. That is right.

Q. What did you do, if anything, with respect to that petition? A. Well, I just held it up until the Judge came in.

262 Q. Did you ask the Judge what date you should put on it? A. Yes, I did.

Q. What were you told? A. I was told to stamp it June 1.

Q. Were you aware that that was the same petition that Mr. Cheatham had told you on the telephone the prior night that he had left under the door? A. Yes.

Q. And in spite of that fact you marked it June 1, 1951? A. That is right.

* * * * *

The Board: What means did you have of knowing that that was the same petition that Mr. Cheatham had talked to you about?

The Witness: Well, I didn't have any means, Judge, just that he told me a cross petition was being filed by the District.

The Board: You just inferred that that was the same petition?

The Witness: That is right. Of course, I didn't see it the night before.

* * * * *

263 Q. Other than the petition for review filed by the Owens-Illinois Glass Company and the cross petition filed by the District of Columbia, were there any other petitions for review or cross petitions filed in the case of Owens-Illinois Glass Company v. the District of Columbia? A. I haven't seen any others.

* * * * *

AID - *W. H. Jones* Collector of Taxes

JUL-20-50 291

CREDIT
1949
LEVY

1948 — FRANCHISE TAX — 1948
GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF THE ASSESSOR, D. C.

Date of Assessment **6-30-50**

First Half	
Second Half	
Both Halves	
Unpaid Balance	
Deficiency	X

Name	Total Tax	Previous Credit	Date	Payment Due
Owens-Illinois Glass Company Ohio Bldg., Toledo, Ohio	3,074.97 150.59 *Interest from 4-15-49 to 6-30-50 @ 6% per annum.	1,000.00		2,224.76
PAID UNDER PROTEST				
Interest on payment due at the rate of 6% per annum must be added if not paid on or before 7-10-50				6.89
Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts., N. W., payable to his order.				2,231.65
If receipt is desired, enclose stamped self addressed envelope.				Credit: 9017 Corporation Tax

PAID UNDER PROTEST

OWENS-ILLINOIS GLASS COMPANY

15378

TOLEDO, OHIO

DATE CHECK NO.

14784

AMOUNT

2224 76

PAY

TO THE ORDER OF

OWENS-ILLINOIS GLASS COMPANY
2224 76 CTS

COUNTY OF TAYLOR
STATE OF OHIO

2 received in full

(in full of \$)

THE NEW YORK TRUST COMPANY
1314 NEW YORK, N. Y.

17

St. M. Morison
TREASURER

PAID UNDER PROTEST

OWENS-ILLINOIS GLASS COMPANY

15413

TOLEDO, OHIO

DATE CHECK NO.
JUL 17 '30 14840

AMOUNT
6 89

PAY
TO THE ORDER OF

SIX DOLLARS AND 89 CTS

COLLECTOR OF TAXES
WASHINGTON D. C.

subject to return

EX. NO. 3

for identification

THE NEW YORK TRUST COMPANY
NEW YORK, N. Y.



Petitioner's Exhibit No. 4.

289

Washington 5, D. C.
July 19, 1950Assessor, District of Columbia
Washington, D. C.

File #9H 1801

Sir:

As attorney for Owens-Illinois Glass Company I am enclosing that Company's checks in the amounts of \$2,224.76 and \$6.89 in payment of the balance shown to be due on the assessment notice of June 30, 1950 which I also enclose.

The total of the deficiency assessment as shown on the notice of June 30, 1950, in the amount of \$3,074.37 plus interest totalling \$157.28 is hereby paid under protest.

All personal property shipped to customers within the District of Columbia during 1948 was solicited by salesmen attached to and working from sales offices located outside the District in that year. Such sales totalled \$794,867.12. None of these sales are fairly attributable to any business carried on within the District of Columbia by the Company nor are these sales attributable to any sources within the District of Columbia within the meaning of those terms as used in the District of Columbia Income & Franchise Tax Act of 1947 as amended.

As attorney for the Company I have, therefore, been authorized to advise you that the total amount set forth in the deficiency notice, i.e., \$3,074.37 plus interest in the amount of \$157.28 is paid under protest.

Very truly yours,

JAMES E. CARR

Paid Under Protest.

ddg

Enclosures

Received Jul 19 1950 Income Tax

* * * * *

Petitioner's Exhibit No. 4A.

290 Alma—

Please mail receipt to: James E. Carr, Esq.,
Union Trust Bldg., City.

Mailed 7-20-50.

In re: Owens-Illinois Glass Company

* * * * *

Respondent's Exhibit "D" Received in Evidence.

302 CLAIM FOR REFUND OF INCOME OR
FRANCHISE TAX.

To be Filed with the Assessor of the District of Columbia.

Name of taxpayer Owens-Illinois Glass Company.

Business address Ohio Building, Toledo, Ohio.

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. Period from January 1, 1948 to December 31, 1948.
2. Amount paid \$1,000.00.
3. Dates of payment April 12, 1949.
4. Amount of refund claimed \$1,000.00.

The deponent verily believes that this claim should be allowed for the following reasons, and is founded upon the following specific grounds:

Tentative return and payment of estimated tax was erroneously made, being predicated on the provisions of the 1947 act.

Amendments thereto were not known at the time, but when completed return was prepared it was found that no liability existed.

(See statement attached hereto and made a part hereof).

* * * * *

STATEMENT ATTACHED TO AND MADE A PART
OF CLAIM FOR REFUND DISTRICT OF COLUMBIA
YEAR 1948.

On April 12th. we filed a tentative return and paid an estimated tax in the amount of \$1,000. The allocation factor used in the estimate was the allocation factor described under (2) (B) of the instructions for the 1947 return quoted below:

"Where the sale was of goods delivered from stock located outside the District (2) to the buyer in the District and title to the goods sold passed outside the District from the seller to the buyer and if the sale resulted from personal solicitation made by the seller in the District in the course of a trade or business engaged in or carried on within the District....50%".

The allocation factor for 1948 completed return was determined as per the instructions under item (2) (a) 1,—

Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this instruction the phrase "District Sales" shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by employees, agents, officers and branches of the corporation located in the District; and the phrase "Total Sales" shall mean the gross receipts from all sales."

• • • • •

306

Respondent's Exhibit E.

Registered Letter

Return Receipt Requested

March 20, 1950

Re: File #9103

Owens-Illinois Glass Co.

Ohio Building

Toledo, Ohio

Gentlemen:

The examination by this office of your income and/or franchise tax return(s) for the year(s) ended December 31, 1948 indicates that the adjustment of your tax liability, as shown in the accompanying statement, is warranted.

If You Agree to the adjustment in tax as shown in the accompanying statement, the enclosed form of waiver should be executed and forwarded to this office promptly, in order to permit the early assessment of the additional tax and to stop the accumulation of interest. Interest will cease, as of date of assessment, upon payment of amount due to the Collector of Taxes, D. C., within ten (10) days from date of assessment.

If You Do Not Agree to the proposed adjustment, you may file a protest with this office, within thirty (30) days from the date of this letter, stating the grounds for your exceptions. Any protest so filed will have careful consideration and, if you so request, an opportunity for a hearing in this office will be granted you prior to final determination of any deficiency in tax against you.

Should you fail to file either the enclosed form of waiver or a written protest with this office within the thirty-day period mentioned, final determination of your tax liability will be made and notice and demand will be sent you in accordance with the provisions of law applicable to the

assessment and collection of income and/or franchise tax deficiencies.

Yours very truly,

C. A. BEARD, JR.

Administrator

Income and Franchise Tax Division

Enclosures:

Statement

Form of Waiver

307

Owens-Illinois Glass Co.

Ohio Building

Toledo, Ohio

Calendar Year 1948.

Net taxable income, per Form D-20		\$18,392,617.60
Less: Interest	\$135,211.34	
Rents	346,785.91	
Royalties	63,383.51	
Other Income*	1,197,495.10	1,742,875.86
Net taxable income subject to apportionment factor		\$16,649,741.74
x Revised D. C. apportionment factor**		.003693
Revised D. C. net taxable income		\$61,487.49
Tax @ 5%		\$3,074.37
Less amount reported		None
Deficiency		\$3,074.37

*Exclusive of purchase discounts, totalling \$463,867.29, which constitute reduction of "cost of goods sold".

**Computation of revised D. C. apportionment factor:

A. Total net sales within and without the District of Columbia, per Form D-20 \$215,214,612.34

B. All sales of goods shipped into the District of Columbia, to the United States, the District of Columbia or others, per sales schedule submitted with your letter dated August 3, 1949	794,867.12
C. Revised D. C. apportionment factor (B ÷ A)	.003693

It is the opinion of this office that the above computation reflects the income which is fairly attributable to business carried on within the District of Columbia.

Based on the foregoing, you are advised that your claim for refund of tentative tax paid in the amount of \$1,000.00 is herewith disallowed.

* * * * *

**BRIEF FOR DISTRICT OF COLUMBIA, RESPONDENT
IN CASE NO. 11,137, AND PETITIONER IN NO. 11,145**

**IN THE
United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,137

OWENS-ILLINOIS GLASS Co., Petitioner,

v. United States Court of Appeals

*DISTRICT OF COLUMBIA, Respondent for the
District of Columbia Circuit*

No. 11,145

FILED JAN 29 1952

DISTRICT OF COLUMBIA, Petitioner *Joseph W. Stewart*

v. CLERK

OWENS-ILLINOIS GLASS Co., Respondent.

**PETITIONS FOR REVIEW OF DECISION OF THE BOARD OF TAX
APPEALS FOR THE DISTRICT OF COLUMBIA**

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
HARRY L. WALKER,
Assistant Corporation Counsel, D. C.,
WILLIAM S. CHEATHAM,
Assistant Corporation Counsel, D. C.,
Attorneys for District of Columbia,
District Building,
Washington 4, D. C.

QUESTIONS PRESENTED

In the opinion of the District of Columbia, respondent and cross-petitioner, the questions presented are as follows:

1. Whether the Board was without jurisdiction of an appeal from the action of the Assessor in making a deficiency assessment when the Board found that the taxpayer did not first pay the tax under protest before filing the appeal with the Board.

2. Whether the Board was without jurisdiction of an appeal from the denial of a claim for refund when the appeal was filed more than 90 days after the date of the denial, or in the alternative if the payment is to be considered as a part of the deficiency payment, whether the Board was without jurisdiction when the payment of that part of the tax was paid voluntarily and without protest more than a year before a deficiency assessment was made.

3. Whether the District's cross-petition for review by this Court was filed timely with the Board when, because the taxpayer's petition for review was not filed until 15 minutes before the Board customarily (not by rule) closed, it was necessary to place the District's cross-petition under the door of the Clerk of the Board's office an hour after it closed but not until the Member Sole was informed by telephone at his home that it would be so placed and the Clerk was in the same manner informed an hour later that it had been so placed and neither of them suggested that a copy of the cross-petition be handed them at home.

4. Whether the taxpayer was carrying on or engaged in business during 1948 and is therefore liable to the District for franchise tax on such income therefrom as is attributable thereto.

INDEX

SUBJECT INDEX

	PAGE
Jurisdictional Statement	1
Counter-Statement of the Case	3
Preliminary Statement	3
Statement of the Case	3
Statutes Involved	14
Regulations Involved	19
Statement of Point	21
Summary of Argument	21
Argument	24
I. <i>The Board was without jurisdiction of the portion of the tax paid under protest subsequent to the deficiency assessment but not before the petition was filed</i>	24
II. <i>The Government may not be estopped by acts of its agents or employees</i>	30
III. <i>The Board was without jurisdiction of the portion of the tax voluntarily paid</i>	32
IV. <i>The District's cross-petition for review by this Court was filed with the Board within 30 days after the Board entered its amended decision</i>	34
V. <i>The Taxpayer was engaged in a trade or business within the District and, hence, was subject to tax</i>	38
Conclusion	48

CASES CITED

<i>Commonwealth v. DeFord Co.</i> , 137 Va. 542, 120 S. E. 281	28
<i>Cummings v. Societe Suisse Pour Valeurs De Metaux</i> , 66 App. D. C. 121, 85 F. 2d 287	31
<i>Dailey v. State</i> , 171 Ind. 646, 87 N. E. 4	28
<i>District of Columbia v. McFall</i> , --- U. S. App. D. C. ---, 188 F. 2d 991	9, 25, 26
<i>Elliot v. District of Columbia</i> , 3 McArthur (10 D. C.) 396, 401	29, 30, 31
<i>Estate of Santander v. District of Columbia</i> , B. T. A. Docket No. 912 (1946), 75 W. L. R. 936	36, 37

	PAGE
<i>Frene v. Louisville Cement Co.</i> , 77 U. S. App. D. C. 129, 134 F. 2d 511, 516	47
<i>Hart v. State</i> , 44 N. E. 2d 346	28
<i>Hazen, et al. v. National Rifle Association of America</i> , 69 App. D. C. 339, 101 F. 2d 432	46
<i>Hurst v. Lederer</i> , 273 F. 172 (C. A. 3rd Cir.—1921)	27
<i>Industrial Bank of Washington v. District of Columbia</i> , ___ U. S. App. D. C. ___, 188 F. 2d 46	25, 26
<i>Industrial Coverall Laundry Corp. v. District of Columbia</i> , ___ U. S. App. D. C. ___, 188 F. 2d 669	48
<i>International Shoe Co. v. State of Washington</i> , 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154	47
<i>Lewis-Hall Iron Works v. Blair</i> , 57 App. D. C. 364, 23 F. 2d 972	38
<i>McCord v. Commissioner</i> , 74 App. D. C. 369, 123 F. 2d 164	38
<i>Middlesboro Liquor and Wine Co. v. Berkshire</i> , 77 U. S. App. D. C. 88, 133 F. 2d 39	31
<i>Nippert v. Richmond</i> , 327 U. S. 416, 422, 426, 90 L. Ed. 760, 66 S. Ct. 586	47
<i>Pearson v. Laughlin</i> , ___ U. S. App. D. C. ___, 190 F. 2d. 658, 661	45
<i>Pitman v. State</i> , 59 Okla. 270, 158 P. 1137	28
<i>Royal Ind. Co. v. United States</i> , 313 U. S. 289, 294-295, 85 L. Ed. 1361, 61 S. Ct. 995	30
<i>Rundel v. Boone County</i> , 204 Ia. 965, 216 N. W. 122	28
<i>Rundel v. Boone County</i> 204 Ia. 965, 216 N. W. 122	28
<i>Scheafer v. McFarland</i> , 49 S. D. 605, 207 N. W. 982	28
<i>Sherrick v. State</i> , 167 Ind. 345, 79 N. E. 193	28
<i>State v. Mutual Life Ins. Co.</i> , 175 Ind. 59, 93 N. E. 213	28, 30
<i>Sturtevant v. Ooms</i> , 62 F. Supp. 731, affirmed 81 U. S. App. D. C. 297, 157 F. 2d 706	30
<i>Taylor v. Aultman</i> , 177 Ga. 524, 170 S. E. 355	28
<i>United States v. Globe Indemnity Co.</i> , 94 F. 2d 576, 578	31
<i>United States v. Stewart</i> , 311 U. S. 60, 71, 85 L. Ed. 40, 61 S. Ct. 102	31
<i>Warner Brothers Pictures, Inc. v. District of Columbia</i> , ___ U. S. App. D. C. ___, 168 F. 2d 157	45
<i>Wilbur National Bank v. United States</i> , 294 U. S. 120, 123, 134, 79 L. Ed. 798, 55 S. Ct. 362	31
<i>Woodhull v. District of Columbia</i> , B. T. A. Docket No. 789, 73 W. L. R. 233	46, 47

STATUTES AND REGULATIONS

District of Columbia Revenue Act of August 17, 1937, 50 Stat. 673	
Title IX—Sec. 3 as added May 16, 1938, 52 Stat. 371 as amended by Act of July 26, 1939, 53 Stat. 1108	2, 16, 25
Sec. 4 as added May 16, 1938, 52 Stat. 371	2, 19, 34
Act of March 3, 1881, 21 Stat. 460	10, 17, 27

INDEX—Continued

iii

	PAGE
District of Columbia Income and Franchise Tax Act of 1947 61 Stat. 331	23, 38, 39
Title I—Sec. 4, 61 Stat. 332, as amended by Sec. 1, Act of May 3, 1948, 62 Stat. 206	14
Sec. 4(h) 62 Stat. 206	8, 40
Title III—Sec. 2, 62 Stat. 207, as amended	41
Sec. 2(b)(13)	40
Title VII—Sec. 1, 61 Stat. 345	8
Title X	8, 39
Sec. 1, 61 Stat. 349	15, 39
Sec. 2, 61 Stat. 349	39
Sec. 3, 61 Stat. 349	39
Title XII—Sec. 1, 61 Stat. 352	8, 49
Sec. 5, 61 Stat. 352	24
Sec. 7(a), 61 Stat. 353	10, 17, 26
Sec. 9, 61 Stat. 353	10, 17, 27
Sec. 11, 61 Stat. 355	18, 32
Sec. 15, 61 Stat. 356	10, 18, 27
Title XV—Sec. 1, 61 Stat. 359	2, 16, 18, 24, 32, 33
Regulations promulgated pursuant to the District of Columbia Income and Franchise Tax Act of 1947, as amended.	
Sec. 1-4(d)	19
Sec. 10-1	20
Sec. 10-2(a)	21
D. C. Code, 1940, Supp. VII	
Sec. 47-301	10, 17, 27
Sec. 47-1551c	14, 39
Sec. 47-1551c(h)	41
Sec. 47-1557a(b)(13)	41
Sec. 47-1580	15, 39
Sec. 47-1580a	39
Sec. 47-1580b	39
Sec. 47-1586f	17
Sec. 47-1586h	17
Sec. 47-1586j	18
Sec. 47-1586n	18
Sec. 47-1593	2, 16, 24, 32
Sec. 47-2403	2, 16, 25
Sec. 47-2404	2, 19, 34
Sec. 47-2404(a)	13
Sec. 47-2408	38

OTHER AUTHORITIES

3 Cooley, Taxation, (4th Ed), Sec. 1244	28, 29
H. R. Rep. No. 1792, 80th Cong. 2d Session to accompany S-2409	41

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,137
OWENS-ILLINOIS GLASS Co., *Petitioner*,
v.
DISTRICT OF COLUMBIA, *Respondent*.

No. 11,145
DISTRICT OF COLUMBIA, *Petitioner*,
v.
OWENS-ILLINOIS GLASS Co., *Respondent*.

PETITIONS FOR REVIEW OF DECISION OF THE BOARD OF TAX
APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR RESPONDENT AND CROSS-PETITIONER

JURISDICTIONAL STATEMENT

This is a proceeding to review a decision of the Board of Tax Appeals involving an assessment of franchise taxes for the year 1948. The Board held that the Owens-Illinois Glass Company¹ (petitioner and cross-respondent) did not have income subject to tax in the District during 1948

¹ Hereinafter referred to as the "taxpayer".

on the theory that the taxpayer was not carrying on or engaging in a trade or business in the District and did not receive income from District sources during that year. (App. 12-13.) The Board reversed the action of the Assessor in disallowing the taxpayer's claim for refund in the amount of \$1,000. (App. 22.) The Board dismissed for lack of jurisdiction so much of the appeal as pertained to the amount of \$2,074.37 plus interest. (App. 22.)

Taxpayer paid \$1,000 voluntarily on April 15, 1949, when it filed a tax form. (Tr. 63, 308, 309.) Under date of March 20, 1950, the Administrator notified the taxpayer that its claim for refund of the \$1,000 was disallowed. (App. 114.) On June 30, 1950, the taxpayer was sent a notice of deficiency assessment of \$3,074.37, less the \$1,000 previously paid, plus interest. (App. 105.) On July 19, 1950, the taxpayer filed a petition with the Board of Tax Appeals but it did not pay the unpaid balance of the deficiency assessment until July 20, 1950. (App. 12, 105.)

The amended decision was entered by the Board on April 30, 1951. (App. 21-22.) Petition for review by this Court of the portion of the Board's decision dismissing for lack of jurisdiction the portion of the taxpayer's appeal pertaining to \$2,074.37, plus interest, was filed by the taxpayer on May 31, 1951. (App. 22.) The cross-petition for review of the portion of the Board's decision holding that it had jurisdiction of the portion of the taxpayer's appeal from the denial of the claim for refund of \$1,000 was filed by the District also on May 31, 1951. (App. 22.)

The jurisdiction of this Court is invoked under the provisions of §§ 3 and 4 of Title IX of the District of Columbia Revenue Act of 1937, as added by the Act of May 16, 1938, 52 Stat. 370, c. 223 (§§ 47-2403 and 47-2404, D. C. Code, 1940), as authorized by Sec. 1, Title XV, of the District of Columbia Income and Franchise Tax Act of 1947, 61 Stat. 359, D. C. Code 1940, Sec. 47-1593.

COUNTER-STATEMENT OF THE CASE

Preliminary Statement

Although counsel for the District are cognizant of Rule 17(e)(2) of the Rules of this Court, because the District is petitioner in one of the cases at bar and because counsel deem it necessary to make a complete statement of the case covering both petitions for review in order to afford the Court complete understanding and continuity of the facts involved in both cases, a complete statement is set forth herein on behalf of the District.

STATEMENT OF THE CASE

Taxpayer, a corporation organized under the laws of Ohio, is and was throughout 1948, engaged in the manufacture and sale of a variety of glass products. Its principal place of business was in Toledo, Ohio. (Finding of Fact 1, App. 7.)

During 1948 and several years prior thereto, the taxpayer had one of its officers, one Walter G. Thomas, assistant secretary-treasurer, located in an office maintained in the District by the taxpayer. (App. 34.) Thomas stated that he was the "Washington manager of the office of the" taxpayer. (App. 34.) The taxpayer's office was located at 1627 K Street, N. W. (App. 34.) It consisted of a nine room suite and contained, among other things, from seven to nine desks, nine telephone stands, seven telephones with four main lines and two teletype machines. (App. 45, 47, 51, 54-55.)

The employees of the taxpayer located in its District office in addition to Thomas were his secretary, a stenographer, and a representative of the personnel division in Toledo who, it was testified, kept the Toledo office informed as to changes in federal regulations pertaining to female labor. (App. 37.) The last aforementioned agent of the taxpayer left the District office and went to the

taxpayer's various factories located in different states when any of the factories became involved in female labor regulations. (App. 38.) A representative of the American Structural Products Co., a wholly-owned subsidiary of the taxpayer, used one of the rooms in the taxpayer's office, as well as the taxpayer's stenographer, when he needed her services. (App. 44, 48-49.)

The American Structural Products Company was incorporated in 1947. (App. 44.) Soon after its incorporation its name was placed on the front door of the taxpayer's District office. (App. 49.) Prior to the organization of that corporation the taxpayer's staff located in its District office sold glass building blocks. (App. 44-45.) An advertisement was placed in the October, 1950, issue of the Washington Classified Telephone Directory, published by the Chesapeake & Potomac Telephone Company, on page 363, reading as follows (App. 68-69):

"INSULUX GLASS BLOCK

"American Structural Products Company is a wholly-owned subsidiary of the Owens-Illinois Glass Company. It has taken over the manufacture and sale of Insulux Glass Block and other Owens-Illinois structural products."

"Where to buy it."

"Sales office."

"American Structural Products Co., 1627 K, N. W. National 8412"

"Distributors"

"Hires-Turner Glass Co., Rosslyn, Va. JACK-son 4-1000"

"United Clay Products Co., Continental Bldg., DIstrict 0787"

The taxpayer's utility room was occupied with its subsidiary's samples. (App. 48, 49.)

The taxpayer had three salesmen with headquarters in Baltimore who spent approximately one day a week each during 1948 in the District soliciting and negotiating sales of the taxpayer's merchandise to customers in the District. (App. 41, 58, 59, 64-65.) All of such sales were negotiated or secured by personal contact in the District with customers located there. (App. 33, 64-65.) The telephones and teletype machines were available to those salesmen and were used by them. (App. 42.) Although Thomas stated that desks in the taxpayer's District office were not allocated to the salesmen (App. 42), he admitted that he was not in the office continuously during office hours and that the salesmen would come in while he was not there and, of course, he did not know what they did in the office during his absence (App. 47-48). Thomas also said that he did not ask them what they did in the District office nor did the salesmen tell him. (App. 73.) In a discussion between Thomas and an examiner in the office of the Administrator of Income and Franchise Taxes concerning the taxpayer's liability before the assessment was made, Thomas stated that the salesmen would make calls to customers in the District from the taxpayer's District office. (App. 69-70.)

During 1948 there were displays of various glass products, such as tumblers, vases, ornamental glassware and glass brick in the taxpayer's District office. (App. 32.) Catalogues were also kept there. (App. 39.) The taxpayer's name, District office address and telephone number were listed in the Washington Classified Telephone Directory for 1948 under "glass". (App. 44, 69.)

Thomas testified that he knew officers of several of the companies which were customers of the taxpayer during 1948. (App. 43-44.) He did not explain, nor does the record show, how he happened to be acquainted with most of these persons whose business required the use of glass products or how he knew they were customers of the tax-

payer. Although he testified that he did not "do any business with any of these gentlemen," the record does not disclose whether or not such customers did business with someone else in the taxpayer's office. (App. 43-44.)

Thomas testified that in 1948 the taxpayer's District office "received regularly inquiries with respect to" the sale of its products in the District and that the District office would "Confirm them and refer them to the Baltimore office as a general thing." (App. 53.) The District office also furnished specifications and approximate prices to District customers including agencies of the Federal Government. (App. 53-54.)

The taxpayer's District office staff had frequent contact with the Alcoholic Tax Unit Division of the U. S. Treasury in connection with the securing of permits from that division for the manufacture of bottles and cases of different designs. (App. 36.) It had a close relationship with the Food and Drug Administration pertaining to the packing of food products. (App. 36.) Information was obtained elsewhere in the Department of Agriculture concerning quantities of crops in production so the taxpayer would be better equipped to anticipate the demand for glassware. (App. 36.) Such functions affected the taxpayer's business as a whole. (App. 36.) In addition, the District office kept the Toledo office informed as to legislative matters pending before Congress, and as to informational releases and regulations prescribed by agencies such as Internal Revenue and the Department of Labor. (App. 36.)

During 1948 the taxpayer sold, and shipped directly to customers located in the District, merchandise for \$794,867.12. (Tr. 65, 311, App. 114.) Of that amount the taxpayer contended to the Assessor that \$201,241.04 was derived from sales made to District customers by its salesmen working in the District but having headquarters in Philadelphia. (Tr. 311.) However, the record does not contain any evidence concerning the manner in which such

salesmen operated or made the sales involved to District customers. (Tr. *passim*.)

On April 15, 1949, the taxpayer filed with the Collector of Taxes a 1948 District of Columbia Franchise Tax form marked "Tentative Return" and paid without protest \$1,000 at the time it filed that tax form. (Tr. 308, 309 App. 110, 111.) On August 3, 1949, the taxpayer filed with the Assessor a claim for refund of the \$1,000. (App. 110-111.) Under date of March 20, 1950, the Administrator of Income and Franchise Taxes sent the taxpayer a notice disallowing the claim for refund and proposing a deficiency assessment based upon the ratio of all sales of goods shipped into the District to the total sales of goods everywhere. (App. 112-114.) On June 30, 1950, the taxpayer was sent a notice of a deficiency assessment of taxes in the amount of \$3,074.37, less the \$1,000 paid on April 15, 1949, plus interest at 6% per annum from April 15, 1949, to June 30, 1950, amounting to \$150.39. (App. 105.) That assessment was not paid within ten days of the date of the notice. Additional interest was, therefore, charged at the same rate in the amount of \$6.89, making a total due of \$2,231.65, which the taxpayer did not pay under protest until July 20, 1950 (Finding of Fact 13, App. 12, 105), although on July 19, 1950, the taxpayer filed a petition with the Board of Tax Appeals appealing from the deficiency assessment and seeking a refund of the \$2,231.65 paid under protest and of the \$1,000 paid voluntarily (App. 2-4). In its petition the taxpayer alleged that the Assessor erred in determining that it was engaged in business within the District during the calendar year 1948, in determining that it had any income from District sources during 1948, in determining that sales made by petitioner in the amount of \$794,867.12 to customers located in the District were fairly attributable to business carried on within the District by it, and in determining a deficiency tax for that year in the amount of \$3,074.37 plus interest of \$157.28. (App. 2-3.) The theory

upon which the taxpayer based such allegations is, *inter alia*, as follows: that although the taxpayer maintained an office in the District during 1948 its office was used solely for liaison work with the United States Government and was not used for the making of sales, that it had no warehouse or storage facilities in the District during that year, and that "All * * * merchandise shipped to customers in the District of Columbia was solicited by * * * [taxpayer's] salesmen who were attached to and traveled from [taxpayer's] sales offices * * * located outside the District of Columbia." (App. 3, 4.)

On January 12, 1951, the Board, after a hearing entered findings of fact, conclusions of law, a decision, and a memorandum opinion on the merits of the case. (App. 7-17.) The decision (1) canceled the deficiency assessment in the amount of \$2,074.37 and interest thereon in the amount of \$157.28, a total of \$2,231.65 and ordered a refund thereof; and (2) reversed the action of the Assessor in disallowing the taxpayer's claim for refund in the amount of \$1,000. (App. 16-17.) Although the Board found (Finding 2, App. 7) that the taxpayer maintained an office in the District during 1948, the Board held that the office was not "a business office or sales office" (App. 15) notwithstanding the fact that the office "affected or might affect the operations of" the taxpayer (Concl. of L. 1, App. 12; App. 15). The Board further held that the taxpayer "was not engaged in carrying on a trade or business in the District" within the meaning of Section 4(h) of the District of Columbia Income and Franchise Tax Act of 1947, as amended; that the taxpayer did not derive income from sources within the District within the meaning of Title X of that Act; and that it did not have taxable income for the year 1948 within the meaning of Section 1 of Title VII of that Act. (App. 12-13.)

On January 19, 1951, the District filed a motion to amend conclusions of law; to vacate the decision, and to enter a

proper decision. (Tr. 19-20.) In this motion the District moved the Board to conclude that it lacked jurisdiction of the entire appeal because (1) the petition was filed more than 90 days from the date of the denial of the claim for refund of the \$1,000 payment made voluntarily and, (2) that the petition was filed with the Board before the \$2,231.65 was paid under protest in writing. (Tr. 19-20.) At the same time the District filed an alternative motion to amend conclusions of law, to vacate the decision, and to enter a proper decision. (Tr. 22.) In its alternative motion the District stated that in the event the Board might deny, in whole or in part, the District's motion to amend conclusions of law, to vacate the decision, and to enter a proper decision, the District moved the Board to amend Conclusions of Law Nos. 1 and 2 so as to conclude that petitioner was engaged in a trade or business within the District and received income derived from sources within the District during 1948 for the reason that Conclusions of Law Nos. 1 and 2 were contrary to the Board's findings of fact and the evidence, and were erroneous in law. (Tr. 22.) After oral argument on the District's motions, the Board overruled them by order entered February 2, 1951, accompanied by a memorandum opinion. (App. 17-19.)

On February 23, 1951, the Board, of its own motion, entered an order vacating its decision of January 12, 1951, and stated in a memorandum accompanying the order that its action was based upon *District of Columbia v. McFall*, ____ U. S. App. D. C. ____, 188 F. 2d 991, decided earlier the same day by this Court. (App. 19.) On February 27, 1951, the District filed a motion to dismiss on the ground that the Board lacked jurisdiction for the reasons that (1) the taxpayer filed its appeal with the Board before it paid the \$2,231.65 under protest in writing instead of first paying the tax under protest and then filing the appeal as required by the statute, and, (2) that the appeal was filed more than 90 days after the disallowance of the claim for refund of the \$1,000 which was voluntarily paid. (Tr. 29.)

On March 23, 1951, the Board heard testimony pertaining to the date and manner in which the \$2,231.65 was paid under protest. (App. 73-95.)

One of the taxpayer's counsel testified that during the middle of the afternoon of July 19, 1951, he left two checks drawn by the taxpayer which totalled \$2,231.65 with an examiner in the Office of the Administrator of Income and Franchise Taxes, a part of the Office of the Assessor. (App. 20, Finding 16, App. 73, 75-76, 77.) The taxpayer's receipted notice of assessment shows a cash register stamp stating that the \$2,231.65 was paid to the Collector on July 20, 1950. (App. 105, Tr. 65, 286.) The Collector's coupon informs taxpayers of the law in the District with respect to whom taxes shall be paid (District of Columbia Income and Franchise Tax Act of 1947, Secs. 7(a), 9, 15 of Title XII; the Act of March 3, 1881, 21 Stat. 460, D. C. Code 1940, Sec. 47-301) by stating in the lower left hand corner thereof as follows:

“Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts., N. W., * * * .” (App. 20, Finding 15, App. 105.)

One Alva Arth, a clerk-bookkeeper in the Income and Franchise Tax Division of the Assessor's office (App. 90) testified that she believed she remembered that Carr, attorney for the taxpayer, came to her office on July 19, 1950, after the Collector's office had closed (App. 93). The Collector's office closes at 3:45 P. M. each day and the cashier's machines are locked on that minute. (App. 21, Finding 20, App. 86, 88.) The record does not show who in the Assessor's office took the two checks involved to the Collector for the taxpayer nor does it show at what time the checks reached the Collector. The offices of the Collector and the Assessor are distinct and separate from each other. (App. 87.) Guy W. Pearson, who has held the office of Col-

lector of Taxes for the District of Columbia since the first of December, 1940, testified that at no time has he, or anyone in his employ, authorized the Assessor or anyone in the Assessor's employ to receive payments of taxes as an agent for the Collector. (App. 20, Finding 17, App. 84.) He further stated that he can not do anything about the Assessor's office receiving checks by mail or otherwise (App. 85) but before a receipt can be rendered to a taxpayer a bill and payment must be presented to the Collector (App. 87) and it is not possible to record an amount as having been paid and to process it until the check, money order or currency is in the custody of the Collector (App. 89). The Collector testified that he would not object if a taxpayer leaves money with the Member Sole of the Board of Tax Appeals for the Member Sole to take to the Collector and make the payment for the taxpayer but he also stated that the Assessor had no more authority to act as his agent than the Member Sole of the Board of Tax Appeals had. (App. 89-90.)

On April 30, 1951, the Board entered an order making additional findings of fact and amended conclusions of law and an amended decision holding that it lacked jurisdiction of the appeal of the deficiency assessment of \$2,074.35 and interest thereon but the Board reversed the action of the Assessor in disallowing the claim of the taxpayer for refund of the \$1,000. (App. 19-22.)

On May 31, 1951, the last day allowed by the statute for either party to appeal, at approximately 4:30 P. M. counsel for the taxpayer filed a petition for review by the United States Court of Appeals for the District of Columbia Circuit of the amended decision of the Board. (App. 22, 101.) The Corporation Counsel and the Assessor had instructed the assistant corporation counsel who was serving as chief of the tax division of that office not to petition for review but that if the taxpayer filed a petition for review then a cross-petition should be filed on behalf of the District.

(App. 24, Finding 6, App. 97-98.) The Clerk of the Board of Tax Appeals made service upon the Corporation Counsel of the taxpayer's petition for review by delivering a copy thereof to a clerk-stenographer in the office of the chief of the tax division at about 4:45 P. M. on May 31, 1951. (App. 23, Finding 3, App. 96.) That clerk-stenographer was instructed to and did make an effort to reach someone in the Board of Tax Appeals by telephone immediately but did not receive any answer. (App. 96-97.) Almost immediately a cross-petition for review was prepared by an assistant corporation counsel and the same clerk-stenographer. (App. 98.) The cross-petition was complete and ready to be filed at 5:40 P. M. (App. 98) but before that time, while the cross-petition was being prepared, the chief of the tax division talked to the Member Sole of the Board of Tax Appeals at his home by telephone, and informed him that inasmuch as the District had received the petition for review filed by the taxpayer at such a late hour, and as that day (May 31, 1951) was the last day for filing a cross-petition as well as a petition for review, and as the door to the Board of Tax Appeals was not open, a cross-petition would be slid under the door to the Board's room. (App. 24, Finding 6, App. 98.) Upon being so informed the Member Sole replied "You have done so". (App. 98.) Subsequent thereto and at approximately 5:45 an assistant corporation counsel, accompanied by and in the presence of the chief of the tax division, slid the cross-petition in the required number of copies under the door leading to the Board of Tax Appeals. (App. 24, Finding 7, App. 98, 99.) The assistant corporation counsel who slid the cross-petition under the door called the Clerk of the Board of Tax Appeals at her home that evening about 6:30 o'clock and told her how his office had endeavored to reach her, or someone in the Board's office just before five o'clock, that the chief of the tax division had called the Member Sole at his home to explain that the cross-petition

would be put under the door, and that the cross-petition had been so placed. (App. 24, Finding 7, App. 103.)

On June 1, 1951, when the Clerk of the Board of Tax Appeals arrived at the office of the Board at 8:20 A. M. she found the cross-petition for review filed by the District. (App. 24, Finding 8, App. 103.) It was lying on the first desk to the right of the front door. (App. 103.) She asked the Member Sole what filing date she should place on the cross-petition and "was told to stamp it June 1." (App. 24, Finding 8, App. 104.) Thereafter on the same day (June 1) the District filed a motion to correct the filing date of the cross-petition for review by changing "June 1, 1951" to "May 31, 1951", the date the cross-petition was filed. (App. 23, Tr. 40.)

On June 21, 1951, the Board heard testimony pertaining to the filing of the cross-petition for review. (App. 95-104.) One Eunice Bronson, employed in connection with janitorial functions of the District Building, testified that she arrived at the District Building between 3:20 and 3:30 A. M. on June 1, 1951, and that she went directly to Room 209 which is the office of the Clerk of the Board of Tax Appeals to begin her work. (App. 24, Finding 8, App. 100.) As she opened the door of Room 209 she saw pieces of paper on the floor just inside of the door. Upon picking them up she glanced over them and saw that they pertained to "a thousand dollar suit concerning some Illinois company." She stated that she placed the papers on the desk nearest to the door. (App. 24, Finding 8, App. 100.)

The Board, on June 28, 1951, entered findings of fact and conclusions of law accompanied by a memorandum on the District's motion to correct the filing date of its cross-petition for review. (App. 23-27.) The Board held that the District's cross-petition for review was filed on May 31, 1951, within 30 days after the amended decision of the Board within the meaning of the Act of August 17, 1937, 50 Stat. 673, as amended, D. C. Code, 1940 ed., Sec. 47-2404(a),

and it further held that the file stamp should be corrected to read "May 31, 1951". (App. 25, 27.) On the same date the Board entered an order directing the Clerk of the Board to correct the date stamped on the District's cross-petition to May 31, 1951. (App. 27.)

STATUTES INVOLVED

The statutory provisions involved in the question of whether the taxpayer was engaged in business and had taxable income derived therefrom are contained in the District of Columbia Income and Franchise Tax Act of 1947, as amended, are as follows:

Title I, Sec. 4, Act of July 16, 1947, 61 Stat. 332, as amended by Sec. 1, Act of May 3, 1948, 62 Stat. 206, D. C. Code, 1940, Supp. VII, § 47-1551c.

" § 47-1551c. General definitions.

"For the purposes of this article and wherever appearing herein, unless otherwise required by the context— * * *

"(h) The words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District of Columbia; and include the performance of the functions of a public office: *Provided, however,* That the words 'trade or business' shall not include, for the purposes of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; * * *

"(2) Sales of tangible personal property by a corporation or unincorporated business which does

not maintain an office or other place of business in the District and which has no office[r], agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article." * * *

Title X, Sec. 1, Act of July 16, 1947, *supra*, as amended by Act of 1948, *supra*, D. C. Code, 1940, Supp. VII § 47-1580.

PURPOSE OF ARTICLE. — It is the purpose of this article to impose (1) an income tax upon the entire net income of every resident and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District: *Provided, however,* That, in the case of any corporation, the amount received as dividends from a corporation which is subject to taxation under this article, and, in the case of a corporation not engaged in carrying on any trade or business within the District, interest received by it from a corporation which is subject to taxation under this article shall not be considered as income from sources within the District for the purposes of this article. The measure of the franchise tax shall be that portion of the net income of the corporation and unincorporated business as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: *Provided further,* That income derived from the sale of tangible personal property by a corporation or unincorporated business not carrying on or engaging in trade or business within the District as defined in sections 47-1551 to 47-1551c [title I of this article] shall not be considered as income from sources within the District for purposes of this article, with the

exception of income from sales to the United States not excluded from gross income as provided in section 47-1557a (b) (13) [title III, section 2 (b) (13) of this article.]” (Statutory language in brackets.)

The statutory provisions pertaining to the question of whether the Board was without jurisdiction of the portion of the petition pertaining to the deficiency assessment are as follows:

Title XV, Sec. 1, Act of July 16, 1947, 61 Stat. 359, D. C. Code, 1940, Supp. VII, Sec. 47-1593.

“Sec. 1. Appeal to Board of Tax Appeals for the District of Columbia.—Any person aggrieved by any assessment of a deficiency in tax determined and assessed by the Assessor under the provisions of title XII, section 5 of this article and any person aggrieved by the denial of any claim for refund made under the provisions of title XII, section 11 of this article, may, within ninety days from the date of the assessment of the deficiency or from the date of the denial of a claim for refund, as the case may be, appeal to the Board of Tax Appeals for the District of Columbia, in the same manner and to the same extent as set forth in sections 3, 4, 7, 8, 9, 10, 11, and 12 of title IX of the Act entitled ‘An Act to amend the District of Columbia Revenue Act of 1937, and for other purposes’, approved May 16, 1938, and as the same may hereafter be amended.”

Title IX, Sec. 3, Act of August 17, 1937, as added May 16, 1938, 52 Stat. 371, as amended by the Act of July 26, 1939, 53 Stat. 1108, D. C. Code, 1940, Sec. 47-2403.

“§ 47-2403. Appeal from assessment—Payment under protest—Hearing and decision.

“Any person aggrieved by any assessment by the District against him of any personal-property, inheritance, estate, business-privilege, gross-re-

ceipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing. * * *

Title XII, Secs. 7(a) and 9, Act of July 16, 1947, 61 Stat. 353, D. C. Code, 1940, Supp. VII, Secs. 47-1586f and 47-1586h

"Sec. 7. (a) Time of Payment.—One-half of the total amount of the tax due as shown on the taxpayer's return shall be paid to the Collector on the 15th day of April following the close of the calendar year and the remaining one-half of such tax shall be paid to the Collector on the 15th day of October * * *

"Sec. 9. Tax a personal debt.—Every tax imposed by this article, and all increases, interest, and penalties thereof, shall become, from the time it is due and payable, a personal debt, from the person or persons liable to pay the same to the District and shall be entitled to the same priority as other District taxes, and the taxes levied under this article and the interest and penalties thereon shall be collected by the Collector in the manner provided by law for the collection of taxes due the District on personal property in force at the time of such collection."

Act of March 3, 1881, 21 Stat. 460, D. C. Code, 1940, Sec. 47-301.

"§ 47-301. Collector of taxes—To collect all revenues.

"The collector of taxes for said District shall collect all revenues of the District and deposit the

amounts collected daily with the Treasurer of the United States."

Title XII, Sec. 15, Act of July 16, 1947, 61 Stat. 356, D. C. Code, 1940, Supp. VII, Sec. 47-1586n.

"§ 47-1586n. Payment to Collector and receipts.

"The taxes provided under this article shall be collected by the Collector and the revenues derived therefrom shall be turned over to the Treasury of the United States for credit to the District in the same manner as other revenues are turned over to the United States Treasury for credit to the District. The Collector shall, upon written request, give to the person making payment of any income tax a full written or printed receipt therefor."

The statutory provisions pertaining to the question of whether the Board was without jurisdiction of an appeal from the denial of a claim for refund when the appeal was filed more than 90 days after the date of the denial are Title XV, Sec. 1, Act of July 16, 1947, *supra*, and the following:

Title XII, Sec. 11, Act of July 16, 1947, 61 Stat. 355, D. C. Code, 1940, Supp. VII, Sec. 47-1586j.

"Sec. 11. REFUNDS.—Except as to any deficiency taxes assessed under the provisions of section 5 of this title, where there has been an overpayment of any tax imposed by this article, the amount of such overpayment shall be credited against any income tax or installment thereof, whether such tax was assessed as a deficiency or otherwise, then due from the taxpayer, and the balance shall be refunded to the taxpayer. No such credit or refund shall be allowed after three years from the time the tax was paid unless before the expiration of such period a claim therefor is filed by the taxpayer, and no tax or part thereof which the Assessor may determine to have been an

overpayment shall be refunded after the period prescribed therefor in the Act appropriating the funds from which such refund would otherwise be made. The amount of such credit or refund shall not exceed the portion of the tax paid during the three years immediately preceding the filing of the claim, or if no claim was filed, then during the three years immediately preceding the allowance of such credit or refund. Every claim for credit or refund must be in writing, under oath; must state the specific grounds upon which the claim is founded, and must be filed with the Assessor: * * *

The statutory provision pertaining to the question of whether the District's cross-petition for review was filed timely is as follows:

Title IX, Section 4, Act of August 17, 1937, as added May 16, 1938, 52 Stat. 371, D. C. Code, 1940, Sec. 47-2404.

“§ 47-2404. Review by court—Procedure—Decision of board, when final—Modification or reversal.

“(a) The decision of the board may be reviewed by the court as hereinafter provided if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. Such petition for review shall be filed with the board, and shall be in such form as the board by regulation shall provide. * * *

Regulations Involved

The regulations promulgated pursuant to the District of Columbia Income and Franchise Tax Act of 1947, as amended, which were in effect during 1948, the tax year involved, are, insofar as here pertinent, as follows:

“Sec. 1-4 * * *

“(d) Where any of such words and terms as are defined in Sec. 4, Title I, and elsewhere in said District of Columbia Income and Franchise Tax Act

of 1947, as amended, is used in these regulations, it shall have the same meaning as defined in said Act."

"Sec. 10-1. It is the purpose of the Act, as amended, to impose (1) an income tax upon the entire net income of every resident as defined in Title I, and every resident estate and trust, and (2) a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District as defined in Title I and for the privilege of receiving such other income as is derived from sources within the District, except those corporations and unincorporated businesses hereinafter specifically excluded. As defined in Title I the words 'trade or business' include the engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity in the District, except as hereinafter provided.

"While it is not the purpose of these regulations to give specific definitions which may cover most conceivable kinds of employment or activity which come within the statutory definition of 'trade or business', two general definitions are important and are given below:

"a. A 'business' is that which occupies the time, attention and labor of men for the purpose of a livelihood or profit. Engaging in business involves the investment of time or capital, or both, on the future outcome of the enterprise, whether it be successful or unsuccessful.

"b. 'Commerce' consists of intercourse and traffic and includes the transportation of persons and property as well as the purchase, sale and exchange of commodities.

"The Act provides that the words 'trade or business' shall not include—

"(1) Sales of tangible personal property whereby title to such property passes within

or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse or other place of business in the District, and which has no officer, agent, or representative having an office or other place or business in the District, during the taxable year; * * * ”

“Sec. 10-2 (a). A corporation or unincorporated business may derive income from the sale of real property located in the District, from services performed in the District, from rentals of real or personal property located in the District, or from investments made or other capital employed in the District, and in other ways, and thus be liable for the tax upon such income, even though it maintains no office or other place of business in the District; and income from sales of tangible personal property is taxable, except as set forth in Sec. 10-1, if the taxpayer has a place of business or representative having an office or other place of business in the District.”

STATEMENT OF POINT

The Board erred in holding that it had jurisdiction of that portion of the taxpayer's appeal to the Board involving the action of the Assessor in disallowing the taxpayer's claim for refund of corporation income and franchise tax for 1948 in the amount of \$1,000.

SUMMARY OF ARGUMENT

The taxpayer did not first pay, as required by statute, a 1948 deficiency franchise tax in the amount of \$2,074.37 and interest thereon in the amount of \$157.38 before it filed its petition appealing to the Board of Tax Appeals for the District. The act of leaving checks and a letter of protest with an examiner in the Office of the Assessor does not constitute payment of taxes. The pertinent statutory provisions require that taxes be paid to the

Collector, and the notice of assessment sent the taxpayer contained specific instructions that taxes should be paid to the Collector. As the above-stated amounts were not paid to the Collector until the appeal was filed, the Board did not have jurisdiction of that portion of the taxes and accordingly it properly dismissed that portion of the appeal.

The government may not be estopped by acts of its agents or employees. The fact that the Assessor's employees accepted the checks and letter of protest from the taxpayer's attorney for delivery to the Collector does not estop the District from asserting that the taxes were not paid until they were paid to the Collector.

The remainder of the 1948 taxes in the amount of \$1,000 was paid voluntarily before the taxpayer filed a 1948 tax return. After the taxpayer filed a return and a claim for refund of the \$1,000 the Administrator of Income and Franchise Taxes, by letter of March 20, 1950, notified the taxpayer both that its claim for refund was thereby denied, and that a deficiency assessment would be made. The appeal not having been filed with the Board until July 19, 1950, more than 90 days had passed after the denial of the claim for refund before the appeal was filed. The mere fact that the taxpayer had 30 days after March 20, 1950, in which it could protest the amount of the deficiency assessment, did not affect the Administrator's denial of the claim on March 20, 1950, or make the denial any the less final. On the other hand, inasmuch as the taxpayer did not pay the \$1,000 under protest in writing the Board did not have jurisdiction of that portion of the tax even if it were considered part of the deficiency because there was no showing of any liability until the Administrator denied the claim for refund and proposed the deficiency assessment. It follows that either because the appeal was filed more than 90 days after the claim for refund was denied or because the \$1,000 which was not paid under protest if considered to be a part of the deficiency the Board was clearly in error in holding that it had jurisdiction of the \$1,000 payment.

The District's cross-petition for review by this Court was filed with the Board at 5:45 P. M. on the last day allowed by the

statute for filing such an appeal. The taxpayer's petition for review was not filed until 4:30 P. M. on the same day. Although the rules of the Board do not mention the office hours of either the Board or the Clerk to the Board, it customarily closed at 4:45 P. M. But, as it was not until that hour, that service of the taxpayer's petition for review was made upon the District, it would have been, therefore, literally impossible for the District to file a cross-petition before the customary closing hour of the Board in view of the fact that it had been determined that the District would not institute the appeal. The Board concluded that the cross-petition was filed on May 31, 1951, within 30 days after its amended decision, after making findings to the effect that counsel for the District telephoned the Member Sole of the Board at home at about 5:35 P. M. to inform him that they were filing the District's cross-petition under the door of the Clerk's office; that the cross-petition was placed under the door at 5:45 P. M.; that the clerk was notified by telephone at her home at 6:30 P. M. that the cross-petition had been placed under her office door; that a charwoman, who unlocked and entered the office of the Clerk at about 3:30 A. M. on June 1, 1951, picked the cross-petition from the floor and laid it on a desk in the Clerk's office. The Board was correct in so holding and in holding (App. 26) that "in the absence of a rule providing otherwise for this Board the clock does not strike until midnight of the last day."

If, however, the Court should hold that the Board had jurisdiction over any portion of the tax, the Court should hold that the taxpayer was carrying on or engaged in a trade or business within the District during 1948 within the meaning of the District of Columbia Income and Franchise Tax Act of 1947, as amended, and that the Board erred in holding to the contrary. The principal purpose of the 1948 amendment of the 1947 Act was to amend the definition of the words "trade or business" in such a manner that corporations, not having their principal place of business in the District, would not be considered as carrying on or engaging in any trade or business in the District if (1) they maintained no place of business or representative in the District

or (2) if they maintained a place of business or representative in the District for the sole purpose of doing business with the United States in respect to sales of tangible personal property delivered outside the District for use outside the District. That amendment is inapplicable because (1) the taxpayer did maintain an "office or other place of business in the District" and (2) it was not for the sole purpose of doing business with the United States in respect to sales of tangible personal property delivered outside the District for use outside. The words "trade or business" as defined in the 1947 Act, without applying the amendment, include "the engaging in or carrying on of any trade, business, * * * or commercial activity in the District." The activities carried on in connection with the taxpayer's District office clearly constitute engaging in a trade or business or commercial activity under decisions of this Court.

ARGUMENT

I

The Board was without jurisdiction of the portion of the tax paid under protest subsequent to the deficiency assessment but not before the petition was filed.

The Board concluded (App. 21) that it was without jurisdiction of so much of the appeal as was from the deficiency of \$2,074.37 (and the interest thereon in the amount of \$157.28) because, as the Board found (App. 12), the taxpayer filed its petition with the Board on July 19, 1950, and thereafter on July 20, 1950, paid under protest in writing the deficiency tax plus the interest in the total amount of \$2,231.65. Section 1 of Title XV of the District of Columbia Income and Franchise Tax Act of 1947, D. C. Code, 1940, Supp. VII, Sec. 47-1593, provides that any person aggrieved by any assessment of a deficiency in tax determined and assessed by the Assessor under the provisions of Title XII, Section 5 of this Article, may, within ninety days from the date of the assessment of the deficiency,

appeal to the Board of Tax Appeals for the District of Columbia in the same manner and to the same extent as set forth in Section 3, et seq., of Title IX of the Act entitled "An Act to amend the District of Columbia Revenue Act of 1937, and for other purposes," approved May 16, 1938, 52 Stat. 371, as amended, D. C. Code, 1940, Sec. 47-2403, et seq. Section 3 of that Act, as amended, provides that any such aggrieved person "shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia under protest in writing." Recently, in *District of Columbia v. McFall*, ___ U. S. App. D. C. ___, 188 F. 2d 991, this Court had under consideration the quoted provision of law in resolving the question of whether thereunder "the appeal to the Board of Tax Appeals would lie despite the fact that the protest was filed after instead of before the appeal was filed." Similarly, see *Industrial Bank of Washington v. District of Columbia*, ___ U. S. App. D. C. ___, 188 F. 2d 46, decided a few days after the *McFall* case. In its opinion in the *McFall* case the Court said that "We do not see how it is possible to ignore the requirement that the person shall 'first' pay under protest." As of the time when this taxpayer's (Owens-Illinois Glass Co.) appeal was filed with the Board the deficiency taxes and interest thereon had not been paid. It follows that the appeal to the Board would not lie.

The taxpayer contends (Br. 17) that the *McFall* case is not applicable to the instant case because that case involved a failure to protest the payment and the instant case (insofar as it pertains to \$2,074.37 of the tax plus interest thereon) does not. The taxpayer's contention is clearly erroneous. In the *McFall* case (188 F. 2d 993) this Court held that "The permissible extent of the appeal is the extent to which the tax has theretofore been paid under protest." Accordingly the payment and the protest must be made simultaneously and not only within the 90 days but before the appeal is filed with the Board. Inas-

much as the Board on its own motion vacated its original decision in this case, within a few hours after this Court handed down its decision in the *McFall* case, and cited the *McFall* case as the authority for its reversal, it is clear that the Board considered the *McFall* case controlling as well as applicable. The *McFall* case is, of course, controlling. See also, *Industrial Bank v. District of Columbia, supra*.

The taxpayer argues (Br. 11-17) that leaving with an agent of the Assessor the tax bill in question together with checks in payment thereof and a letter protesting such payment amounts to the payment of the taxes and interest. However, even if the taxpayer did leave the checks with an agent of the Assessor on July 19, 1950, a few minutes before it filed its appeal with the Board, inasmuch as the taxpayer's receipt and the Collector's records (App. 20, Finding 16, App. 105) indicate that the taxes and interest were not actually paid until July 20, 1950, the Board was correct in holding, in effect, that the taxpayer had not borne its burden of proving that it made the payment in question on July 19 (App. 19-21).

The bill sent to the taxpayer for the deficiency taxes (App. 20, Finding 15, App. 105) contained the following instructions:

"Send remittance with both copies of this notice to the COLLECTOR OF TAXES, D. C., District Building, 14th & E Sts., N. W., payable to his order."

Section 7(a) of Title XII of the District of Columbia Income and Franchise Tax Act of 1947 states, in part, that "One-half of the total amount of the tax due * * * shall be paid to the Collector on the 15th day of April * * * and the remaining one-half of such tax shall be paid to the Collector on the 15th day of October * * *. Any deficiency in tax determined by the Assessor * * * shall be due and payable within ten days from the date of assessment."

Section 9 of Title XII of that Act states, in part, that "the taxes levied under this article and the interest and penalties thereon shall be collected by the Collector in the manner provided by law for the collection of taxes due the District on personal property in force at the time of such collection."

The Act of March 3, 1881, 21 Stat. 460, D. C. Code, 1940, Sec. 47-301 states that "The Collector of Taxes for said District shall collect all revenues of the District and deposit the amounts collected daily with the Treasurer of the United States."

Section 15 of Title XII of the District of Columbia Income and Franchise Tax Act of 1947, *supra*, states, in part, that "The taxes provided under this article shall be collected by the Collector * * *. The Collector shall, upon written request, give to the person making payments of any income tax a full written or printed receipt therefor."

There is no provision of statute which gives the Assessor either authority to receive or collect taxes due the District or to issue receipts for taxes. The Collector testified (App. 84) that he has never at any time authorized the Assessor or anyone in his employ to receive payments of taxes as an agent for the Collector and the Board found this to be the fact (App. 20). The taxpayer's counsel did not receive a receipt from the agent of the Assessor with whom the tax bills, checks, and letter of protest were left. It did, however, receive a receipt for the taxes and interest in question from the Collector. (App. 105.) The Collector cannot process a payment without having received the check, money order or currency and does not consider that any payment has been made until it is received by his office. (App. 89.) The Assessor has no more authority than the Board of Tax Appeals to act as agent for the Collector in collecting District Taxes. (App. 90.)

In *Hurst v. Lederer* (C. A. 3, 1921) 273 F. 172, the taxpayer filed a suit to recover taxes claimed to have been illegally collected under protest and by duress because such

taxes had been paid previously. The taxpayer entered the Collector's office by a private doorway in order to avoid long lines at the cashier's window in the Collector's office. The particular deputy collector assigned to the portion of the tax district in which the taxpayer was situated was not in the Collector's office. The taxpayer conferred with another deputy collector who was assigned to a different portion of that tax district and left the money to pay the taxes in an envelope in the desk of the other deputy collector who was then absent. The Court held that the burden of showing that payment had been made was upon the taxpayer and that since the collector had not authorized the deputy to whom the taxpayer talked to receive taxes for the portion of the tax district concerned such deputy had no authority to collect taxes from that taxpayer. The Court said that under the statute the deputy assigned to the portion of the tax district in which that taxpayer was located was the only person, except the Collector's cashier, to whom the taxpayer could validly pay the tax. Accordingly, the attempt to pay did not constitute payment. For other authorities in support of the District's contention that the payment in question was not valid until it was in the hands of the Collector or his duly authorized representative because such payment must be made to the officer authorized by law to receive it, see the following:

Sherrick v. State, 167 Ind. 345, 79 N. E. 193.

Pitman v. State, 59 Okla. 270, 158 P. 1137.

Sheafer v. McFarland, 49 S. D. 605, 207 N. W. 982.

Commonwealth v. DeFord Co., 137 Va. 542, 120 S. E. 281.

Taylor v. Aultman, 177 Ga. 524, 170 S. E. 355.

Rundel v. Boone County, 204 Ia. 965, 216 N. W. 122.

Dailey v. State, 171 Ind. 646, 87 N. E. 4.

State v. Mutual Life Ins. Co., 175 Ind. 59, 93 N. E. 213.

Hart v. State, 44 N. E. 2d 346.

3 Cooley, Taxation (4th Ed.), Sec. 1244.

Section 1244 of Cooley, *supra*, reads as follows:

“TO WHOM PAYMENT TO BE MADE. Payment must be made to the officer authorized to receive the taxes or to someone empowered to act in his behalf, at the taxpayer’s peril. Payment to the wrong officer, although acquiesced in for a long time, does not protect the payor where such officer misappropriates the payment. So the taxpayer is not protected by payment to a collector who fails to account therefor, where the payment is made before the rolls are delivered to the collector so as to authorize him to collect.”

When the taxpayer leaves a check, money order, or currency with the Assessor (or one of his representatives) for the payment of taxes that taxpayer makes the Assessor his agent because it is an employment outside of his official duty and there is no privity between the taxpayer and the District of Columbia. This is clearly apparent from the decision in *Elliot v. District of Columbia*, 3 McArthur (10 D. C.) 396, 401. In the *Elliot* case the Collector was asked to furnish a statement of unpaid taxes upon certain real estate. The statement supplied by the Collector was inaccurate. All of the taxes due were not paid and the District attempted to enforce the collection of the unpaid taxes by selling the real estate involved. The action was brought to restrain the District from selling the property. The Court held (p. 400, 401) that “The duties of the collector are prescribed by statute” and that the law is the only standard of the extent of the Collector’s powers, of which persons are bound to take notice. Likewise, a person, and even more so an attorney, is required “to take notice of the extent” of the Assessor’s authority as prescribed by statute. The delineations and differences in the extent of the authority of the Assessor and Collector are clearly set forth by statute. For a discussion of the delineations and differences in the powers and authorities of the two comparable Federal officers—the Commissioner of Internal

Revenue and the Collector of Internal Revenue see *Royal Ind. Co. v. United States*, 313 U. S. 289, 294-295, 85 L. Ed. 1361, 61 S. Ct. 995. The Court should affirm the portion of the Board's decision dismissing the appeal as it pertained to the deficiency payment of \$2,231.65, including interest, because the taxpayer failed to "first pay" the taxes.

II

The Government May Not Be Estopped by Acts of its Agents or Employees.

The taxpayer's counsel and attorney, who left the tax bill, checks, and letter of protest with the Assessor, was charged with knowledge that the Assessor was not authorized to receive payments for taxes. See *State v. Mutual Life Insurance Co.*, *supra*. The facts and circumstances contained in the record, pertaining to the leaving of the tax bill, the taxpayer's checks, and the letter of protest with the agent of the Assessor, do not show that the Assessor's agent said or did anything to mislead the taxpayer's attorney although the record discloses that checks in payment of deficiency taxes are at times left with members of the Assessor's staff and in turn forwarded by that office to the office of the Collector which receives, processes, and issues receipts for such payments. The taxpayer does not contend that it was deceived or misled by agents of the Assessor. However, even assuming, *arguendo*, that they did mislead the taxpayer or its attorney, the doctrine of equitable estoppel cannot be applied against the District, nor can the mere acceptance of the checks by the agent of the Assessor, as the agent also of the taxpayer, for payment to the Collector operate as an estoppel against the District. *Elliot v. District of Columbia*, *supra*. "It is a well established principle of law that the government may not be estopped by the acts of its agents or employees." *Sturtevant v. Ooms*, 62 F. Supp. 731, Aff'd, 81 U. S. App. D. C. 297, 157 F. 2d 706.

In *Wilbur National Bank v. United States*, 294 U. S. 120, 123-124, 79 L. Ed. 798, 55 S. Ct. 362, the Court said that—

“Undoubtedly, the general rule is that the United States are neither bound nor estopped by the acts of their officers and agents in entering into an agreement or arrangement to do or cause to be done what the law does not sanction or permit. Also, those dealing with an agent of the United States must be held to have had notice of the limitation of his authority.”

The above was cited as an authority on this point in *Cummings v. Societe Suisse Pour Valeurs De Metaux*, 66 App. D. C. 121, 85 F. 2d 287.

In *United States v. Stewart*, 311 U. S. 60, 71, 85 L. Ed. 40, 61 S. Ct. 102, the Farm Loan Board prepared and distributed circulars advising investors of the advantages of farm loan bonds because they were “free from all forms of taxation.” The court held that the Farm Loan Board had no authority to make such representations but said, that—

“An officer or agency of the United States to whom no administrative authority has been delegated cannot estop the United States even by an affirmative undertaking or waive or surrender a public right.”

For other authorities concerning estoppel see the following:

Cummings v. Societe Suisse Pour Valeurs De Metaux, 66 App. D. C. 121, 85 F. 2d 287.

Middleboro Liquor & Wine Co. v. Berkshire, 77 U. S. App. D. C. 88, 133 F. 2d, 39.

United States v. Globe Indemnity Co., 94 F. 2d 576, 578, citing *Elliot v. District of Columbia*, *supra*, with approval.

The taxpayer's contention that the doctrine of equitable estoppel is applicable to the facts in this case is untenable.

III

The Board was without jurisdiction of the portion of the tax voluntarily paid.

The Board erred in failing to dismiss the portion of the appeal as is from the action of the Assessor in denying the taxpayer's claim for refund of the \$1,000 because a period of more than ninety days elapsed from the date of the denial of the taxpayer's claim for refund until the taxpayer filed its petition with the Board. The claim for refund was denied (App. 114) by a registered letter dated March 20, 1950 (App. 112) from the Administrator to the taxpayer. The petition was filed on July 19, 1950, (App. 2). The period between the denial of the claim and the filing of the petition covered 121 days.

Section 1 of Title XV of the District of Columbia Income and Franchise Tax Act of 1947, D. C. Code, 1940, Supp. VII, Sec. 47-1593, provides that any person aggrieved by the denial of any claim for refund made under the provisions of Title XII, Sec. 11, may, within ninety days from the date of the denial of the claim for refund, appeal to the Board.

The taxpayer's claim for refund was predicated upon its theory that it was not liable for any franchise tax because of the effect of the Act of 1948, *supra*. (App. 110.) In the above-mentioned letter (App. 112-114) the Administrator notified the taxpayer of a proposed adjustment in its liability for franchise taxes in the total amount of \$3,074.37. At the end of a statement showing his computation, the Administrator stated the following:

“Based on the foregoing, you are advised that your claim for refund of tentative tax paid in the amount of \$1,000.00 is herewith disallowed.” (App. 114.)

Although the Administrator advised the taxpayer that it might file a protest if it did not agree to the proposed adjustment, it is clear that the Administrator had determined that some liability existed because that was the question before the Administrator in the taxpayer's claim for refund. The protest might have persuaded the Administrator to change the amount of the proposed deficiency assessment but he had already made a final determination that the taxpayer was liable for taxes. In its memorandum opinion (App. 18) the Board held substantially that since the language denying the claim was preceded by the words "based on the foregoing" (the "foregoing" being a notice of a proposed assessment), the Administrator's action denying the claim was not "a final action." The Board's holding was erroneous. The Administrator merely combined in one letter a notice of the denial of the claim for refund with a notice of a proposed deficiency assessment. That the amount set forth in the proposed deficiency assessment might not have been finally determined by the Administrator has no bearing whatsoever on the finality of the denial of the claim. The language "your claim for refund * * * is herewith disallowed" is certainly a positive and final action on the claim for refund. The provision of statute (Sec. 1, Title XV) providing for an appeal from a denial of a claim for refund does not contain either the words "final" or any synonym therefor. It merely states "the denial of a claim for refund."

When the taxpayer paid the \$1,000 at the time it filed the tax form marked "tentative return" there was no disclosure on the tax form of any tax liability, but the taxpayer evidently concluded that it was liable for District of Columbia corporate franchise tax. If it had not been of the opinion that it was liable, it certainly would not have paid such a substantial amount, \$1,000, subject to filing at a later date a return completely filled in, in order to avoid liability for penalties and interest. The "tentative return" gave no information

about the taxpayer's business. (App. 4, Finding 9.) Subsequently, the taxpayer filed a return for 1948 which showed no tax liability. (App. 4, Finding 10.) The only tax imposed for 1948 was the deficiency assessment in the amount of \$3,074.37 plus interest. (App. 105.) The notice of assessment (App. 105) listed the amount of the deficiency assessment plus interest and allowed a credit for the \$1,000 paid voluntarily with the "tentative return." Accordingly, the \$1,000 was actually applied toward a deficiency assessment and not as payment of taxes reported by the taxpayer. However, the \$1,000 payment was paid voluntarily and not "under protest in writing." The statute requires the \$1,000, if a part of a deficiency payment, to be paid under protest in writing in order for the Board to have jurisdiction of the \$1,000 on an appeal to the Board.

The ruling of the Board therefore that it had jurisdiction over the portion of the appeal involving the \$1,000 was erroneous inasmuch as either (1) the appeal was filed with the Board more than ninety days after the denial of the claim for refund or (2) the \$1,000 was in payment of a deficiency assessment but was paid voluntarily and not under protest in writing as is required to give the Board jurisdiction of an appeal from a deficiency assessment.

IV

The District's cross-petition for review by this Court was filed with the Board within 30 days after the Board entered its amended decision.

Section 4, Title IX of the Act of August 17, 1937, D. C. Code, 1940 (Section 47-2404), *supra*, provides that the decisions of the Board may be reviewed by this Court if a petition for such review is filed by either the District or the taxpayer within thirty days after the decision is rendered. It also provides that such petitions for review shall be filed with the Board and shall be in such form as the Board by

regulation shall provide. Proper officials of the District decided and directed that no petition for review of the portion of the case, which had been decided adversely to the District, should be filed unless a petition for review was filed on behalf of the taxpayer for the review of the portion of the case decided adversely to the taxpayer. (App. 97-98.) But if the taxpayer were to file a petition for review, then a cross-petition for review was to be filed by the District. Fifteen minutes before the customary hour for closing the Board of Tax Appeals, which is 4:45 p.m., on May 31, 1951, the thirtieth day after the Board's amended decision was rendered, a petition for review was filed by the taxpayer with the Board. (App. 101.) The first notice to the District that a petition for review had been filed on behalf of the taxpayer was when the Clerk of the Board served a copy of the petition upon a clerk-stenographer in the office of the Corporation Counsel at approximately 4:45 p.m. on May 31. (App. 96, 102, Finding 2, App. 23.) In other words the Clerk of the Board notified the District that the petition had been filed just about the time of day that the Board usually closed its doors.

The taxpayer contends in its argument (Br. 23-24) that it was necessary for the District's cross-petition to be filed during the customary office hours of the Board in order to give this Court jurisdiction over that portion of the case. However, the District must point out that the action on behalf of the taxpayer made it literally impossible for the District's cross-petition to be filed with the Board before its customary closing time. Just before 4:45 p.m. on May 31 the Clerk of the Board handed the taxpayer's petition for review to the Member Sole of the Board who asked the Clerk if she had served it upon the Corporation Counsel. (App. 102.) She replied in the negative. The Member Sole directed the Clerk to "Serve it immediately" (App. 102), and this was done (App. 23). As the Corporation Counsel's staff did not succeed in reaching anyone in the office of the

Board by telephone immediately after the Clerk of the Board had made service upon the Corporation Counsel of the copy of the taxpayer's petition for review (App. 96-97) to ask them to delay closing for a few minutes until a cross-petition for review could be filed for the District, the Assistant Corporation Counsel in charge of the Tax Division telephoned the home of the Member Sole at intervals until the Member Sole reached his home from his office. About 5:35 p.m. on May 31 the Chief of the Tax Division reached the Member Sole at his home on the telephone and explained to him that the taxpayer's petition for review was not served on the Corporation Counsel until the hour at which the Board customarily closed and that an attempt to ask that the Board remain open until the District filed a cross-petition was made without success. (App. 98.) He discussed (App. 24, Finding 6) with the Member Sole the fact that the District's cross-petition would be slipped under the door to the office of the Clerk of the Board in a few minutes in conformity with the principle laid down by the Board (the same Member Sole) in the case of *Estate of Santander v. District of Columbia*, B. T. A. Docket No. 912 (1946), 75 W. L. R. 936. (App. 98.) The Member Sole, when so informed by the Chief of the Tax Division, said "You have done so."² While it is not incumbent upon the Court or members of quasi-judicial bodies to anticipate legal requirements and to advise lawyers how to protect their clients, if the Member Sole, being fully aware of all of the circumstances involved, had not been of the opinion that the District's interests would be fully protected by slipping the cross-petition under the door to the Clerk's office, it would have been exceedingly easy for him to have directed the Chief of the Tax Division to deliver the cross-petition forthwith to the Member Sole at his home or to the

² Mr. George C. Updegraff, the Chief of the Tax Division of the Corporation Counsel's office testified to this telephone conversation with the Member Sole at a hearing held subsequently before the same Member Sole of the Board. (App. 98.)

Clerk of the Board at her home. However, in reiteration, the Member Sole merely said in effect you have told me you are going to put it under my office door right away, from which no inference could possibly be drawn but that the Member Sole intended to accept the cross-petition as being filed on May 31 and within the thirty-day period.

In the *Santander* case, *supra*, the Board's office had closed on the last day for filing an appeal. A District Building guard and the attorney for the taxpayer went to the office of the Board and left the petition wedged between the door-knob and the door frame prior to midnight on that last day. There, the Member Sole held that the petition had been seasonably filed. Within ten minutes after that conversation with the Member Sole over the cross-petition in the instant case the Chief of the Tax Division in the company of another assistant corporation counsel slipped the District's cross-petition with the necessary number of copies specified by the Board's rules under the door of the office of the Clerk of the Board. (App. 98-99.) The other assistant corporation counsel telephoned the Clerk of the Board of Tax Appeals at her home at about 6:30 p.m. on May 31 and informed her of the telephone conversation with the Member Sole at his home and of the fact the cross-petition had been placed under the door to the office of the Clerk of the Board. (App. 24, Finding 7, App. 103.) A charwoman who cleans the office of the Board and the Clerk picked the copies of the cross-petition from the floor of the Clerk's office when she unlocked and opened the door to that office to clean during the night (3:20 to 3:30 a.m. June 1.) (App. 100.)

The cases cited by the taxpayer (Pet. Br. 22-23) in support of its contention that the cross-petition was not filed timely were cited by the Board in its memorandum opinion (App. 25) which accompanied its order granting the District's motion to correct the filing date of the cross-petition for review. The Board in that opinion clearly dis-

tinguished the instant case from the cases of *Lewis-Hall Iron Works v. Blair*, 57 App. D. C. 364, 23 F. 2d 972, and *McCord v. Commissioner*, 74 App. D. C. 369, 123 F. 2d 164. Although the Board customarily closed at 4:45 p.m. it had not by rule established office hours (App. 26) as it had the power to do under the authority of the statute, D. C. Code, 1940, Sec. 47-2408.

When the Board opened for the first time after the cross-petition for review was placed under its door at 5:45 p.m. on May 31 it was then 8:20 a.m. on June 1. (App. 103.) The Clerk found the petition where the charwoman testified she had placed it but the Clerk held the cross-petition without stamping it until she asked the Member Sole what date to put on it. (App. 104.) Although the Member Sole instructed the Clerk to date the cross-petition as though it was not received until June 1, after hearing testimony from all persons concerned with the filing of the petition including the charwoman and the Clerk of the Board and knowing personally as much as he, the Member Sole, did about the events which occurred in connection with its filing, the Board ordered the filing date to be corrected to read May 31, 1951, the date on which the cross-petition was actually filed. This Court, therefore, has jurisdiction of the District's cross-petition for review.

V

The Taxpayer Was Engaged in a Trade or Business Within the District and, hence, was Subject to Tax.

The District, of course, contends that the Board had no jurisdiction over any portion of the taxes involved.

If, however, this Court should hold that the Board had jurisdiction over any portion of the tax involved, then the District contends that the taxpayer was carrying on or was engaged in a trade or business within the District during the tax year within the meaning of the District of Columbia

Income and Franchise Tax Act of 1947, as amended, and that the Board erred in holding to the contrary.

Taxpayer states on pages 24 and 25 of its brief as follows:

"Taxable income is declared by the statute to mean the amount of net income derived from sources within the District (D. C. Code Title 47-1580). As amended by the Act of May 3, 1948 the statute provides that income derived from the sale of tangible personal property by a corporation not carrying on or engaging in trade or business within the District shall not be considered as income from sources within the District (D. C. Code Title 47-1551 to 47-1551c)."

The section of the Code first referred to in the foregoing quotation is Section 47-1580, D. C. Code, 1940, Supp. VII, pages 413, 414. Sections 47-1580, 1580a, and 1580b are codifications of Sections 1, 2, and 3, Title X, Article I of the Act of July 16, 1947, 61 Stat. 349, ch. 258. Said Title X bears the caption "Purpose of Article and Allocation and Apportionment". Section 1 of said Title X bears the caption "Purpose of Article" and in it it is declared that it is the purpose of the Income and Franchise Tax Act to impose, *inter alia*, "a franchise tax upon every corporation and unincorporated business for the privilege of carrying on or engaging in any trade or business within the District and of receiving such other income as is derived from sources within the District * * *" and that "The measure of the franchise tax shall be that portion of the net income of the corporation * * * as is fairly attributable to any trade or business carried on or engaged in within the District and such other net income as is derived from sources within the District: *Provided further*, That income derived from the sale of tangible personal property by a corporation * * * not carrying on or engaging in trade or business within the District as defined in title I of this article shall not be considered as income from sources within the Dis-

strict for purposes of this article, with the exception of income from sales to the United States not excluded from gross income as provided in title III, Section 2(b)(13) of this article". The definition of the phrase "trade or business" referred to in the proviso³ in the above quotation is paragraph lettered (h) of Section 4 of Title I of Article I of the District of Columbia Income and Franchise Tax Act, *supra*. As originally enacted the words "trade or business" were defined therein to "include the engaging in or carrying on of any trade, business, * * * or commercial activity in the District of Columbia * * *". To that definition, as originally enacted, Section 1 of the 1948 amendment added the following proviso:

" * * * *Provided, however,* That the words 'trade or business' shall not include, for the purposes of this article—

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation or unincorporated business which does not physically have or maintain an office, warehouse, or other place of business in the District, and which has no officer, agent, or representative having an office or other place of business in the District, during the taxable year; or

"(2) Sales of tangible personal property by a corporation or unincorporated business which does not maintain an office or other place of business in the District and which has no office[r], agent, or representative in the District except for the sole purpose of doing business with the United States, but such corporations and unincorporated businesses shall be subject to the licensing provisions in title XIV of this article.

"For purposes of this proviso, the words 'agent' or 'representative' shall not include any independ-

³ This proviso was added by Sec. 2 of Public Law 509, 80th Cong., 2d Session, 62 Stat. 207, ch. 246, hereinafter referred to as the "1948 Amendment".

ent broker engaged independently in regularly soliciting orders in the District for sellers and who holds himself out as such." (Public Law 509, 80th Congress, Second Session, Section 1, 62 Stat. 206—D. C. Code, 1940, Supp. VII, Sec. 47-1551c(h)).

Section 3 of the 1948 amendment amended the 1947 Act by adding a new exclusion from the definition of the words "gross income" as defined in Section 2 of Title III of the Income and Franchise Tax Act of 1947 (Title 47-1557a(b) (13), D. C. Code 1940, Supp. VII, pages 404, 405) reading as follows:

"Income derived from the sale of tangible personal property to the United States by corporations and unincorporated businesses having their principal places of business located outside the District, which property is delivered from places outside the District for use outside the District: *Provided, however,* That the taxpayer shall furnish to the Assessor a statement in writing of the amount of gross sales so made and, if required by the Assessor, a list of the names of the agencies of the United States through which such property was sold."

It will be observed that all three sections (1, 2, and 3) of the 1948 amendment relate to "sales of tangible personal property". The purpose of the 1948 amendment, as stated by the Committee on the District of Columbia of the House of Representatives in Report No. 1792, 80th Cong., 2d Session, To Accompany S. 2409, was as follows:

"The purpose of the bill, as amended, is to clarify the language and intent in the District of Columbia Income and Franchise Tax Act of 1947, in order that the tax so provided be not imposed on corporations and unincorporated businesses which do not maintain places of business or representatives in the District of Columbia, or on such con-

cerns which maintain places of business or representatives in the District for the sole purpose of doing business with the United States in respect to sales of tangible personal property delivered outside the District for use outside the District."

It seems certain, therefore, that the principal purpose of the 1948 amendment was to amend the definition of the words "trade or business" in such a manner that those corporations would not be considered as carrying on or engaging in any trade or business in the District if (1) they maintained no place of business or representative in the District, or (2) if they did maintain a place of business or representative in the District it was for the sole purpose of doing business with the United States "in respect to sales of tangible personal property delivered outside the District for use outside the District."

Applying the language of the 1948 amendment, while bearing in mind the purpose underlying its enactment, to the facts in the instant case, it seems clear that the taxpayer was engaged in trade or business within the District during the tax year. The taxpayer did maintain an "office or other place of business in the District" during the tax year at 1627 K Street, N. W., Washington, D. C., and it also had an "officer"⁴ and "agents" "having an office or other place of business in the District" during that year and, therefore, the provisions of subsection (1) of Section 1 of the 1948 amendment are inapplicable. So also inapplicable are the provisions of subsection (2) of Section 1 of the 1948 amendment because that office was not maintained, in the words of the House Committee on the District of Columbia in the foregoing quotation from its report on the bill, "for the sole purpose of doing business with the United States *in respect to sales of tangible personal property delivered outside the District for use outside the District*"

⁴ Walter G. Thomas, an assistant secretary-treasurer of the taxpayer, managed the taxpayer's local office.

(italics supplied). That the District office or place of business of the taxpayer was not for the sole purpose of doing business with the United States in respect to sales of tangible personal property is clear from the testimony of the manager of that office. He testified, in part, as follows:

"Q. Do you know whether there were in fact any sales of tangible personal property by your company, the petitioner here, made here to the United States during the year 1948? A. I do not recall or do not know of any.

"Q. You do not know of any? A. No—sales from my company to the United States Government?

"Q. Yes. A. No.

"Q. If there had been any sales by your company to the United States, they would have been consummated and transacted through your Baltimore or Toledo office; would they not? A. Toledo, I would say.

"Q. Toledo, you would say? A. Yes.

"Q. You would have nothing to do with it? A. No.

"Q. You did not have anything to do with them, did you? A. No." (App. 50.)

This leads to a discussion of the question of whether or not the taxpayer was carrying on or engaged in a trade or business in the District in 1948 without regard to the provisions of the 1948 amendment which, it is submitted for the reasons hereinbefore set forth, are inapplicable. As defined in the 1947 Act the words "trade or business" include, as was hereinbefore stated, "the engaging in or carrying on of any trade, business, * * * or commercial activity in the District of Columbia * * *." Did the taxpayer carry on or engage in any of those activities during the tax year? The facts disclose that it did. The taxpayer's office in the District was an unusually large suite of offices for four regular employees. It contained nine desks, nine telephone stands, and seven telephones with four main lines. The taxpayer's

salesmen with headquarters in Baltimore, so the District manager admitted, telephoned customers located in the District from the District office. The taxpayer's name and office address in the District were listed under the heading "Glass" in the District of Columbia Classified Telephone Directory, 1948. The office contained samples and displays of such as tumblers, glasses, ornamental glassware and brick. Catalogs were kept at the office. Some of the witnesses for the taxpayer testified, in effect, that some customers located in the District would telephone the District office and that such customers would be referred to salesmen. The District manager did not satisfactorily explain what the salesmen from Baltimore did while they were in the District office, but he stated that he did not ask them nor did the salesmen inform him of their activities in the District office.

Surprisingly enough, although the taxpayer contends that its District office had no connection whatsoever with the sales or promotion of its products, the District manager was acquainted with certain officers of the taxpayer's District customers (App. 43-44). Since the District manager knew these customers and did not explain the circumstances of his acquaintanceship, the only reasonable inference that can be drawn is that he knew them through his activities in connection with the taxpayer's business. There are no findings of fact to the effect that that office was not used to further the interest of the taxpayer except that it was used for the purpose of "getting information from various agencies of the Federal Government which affected or might affect the operations of petitioner" (App. 15). There is no evidence that the corporation involved was engaged in charitable, educational, religious or scientific affairs; to the contrary, all the evidence discloses that the corporation was engaged in a profit-making business (Tr. *passim*). As a matter of fact, the Board found that the corporation was, during 1948 and prior thereto, "engaged in the manu-

facture and sale of glass containers" (App. 7). In 1947 the American Structural Products Company was incorporated, and soon after such corporation its name was placed on the front door of the taxpayer's District office (App. 44, 49). Prior to the organization of that corporation the taxpayer's staff located in the District of Columbia, sold building blocks (App. 44-45). As a matter of fact, an advertisement was placed in the October, 1950, issue of the Washington Classified Telephone Directory on page 363, advertising the sale of Insulux Glass Blocks by the American Structural Products Company (App. 68-69). In other words the taxpayer sold these glass blocks prior to the incorporation of that wholly-owned subsidiary. Cf. concurring opinion of Judge Stephens in *Warner Brothers Pictures, Inc. v. District of Columbia*, 83 U. S. App. D. C. 157, 168 F. 2d 157. This, then, is the office or place of business which the Board concluded was not such within the meaning of the statute.

The record is devoid of any evidence showing that the taxpayer did not claim, on either its 1948 Federal or District tax returns, a deduction of the cost to it of maintaining the District office or the wages or other compensation paid the personnel there employed as an ordinary and necessary business expense. It may, therefore, be assumed that the taxpayer did take such deductions on its returns for 1948 because it would have been to the taxpayer's advantage to disclose the fact that no such deductions were taken in order to prove that the District office was not a business office. Cf. *Pearson v. Laughlin*, ____ U. S. App. D. C. ____, 190 F. 2d 658, 661, where this Court recently stated that " 'It is no more right to allow a party to blow hot and cold as suits his interest in tax matters than in other relationships.' "

Under the facts, and in the ordinarily accepted connotation of the term "business office", the District office of the Owens-Illinois Glass Company was indeed a "business office". There is nothing in any of the statutes involved which requires, or indeed permits, any holding that such

office was not "an office * * * or other place of business in the District".

The Board's conclusion that the taxpayer did not have an office or other place of business in the District within the meaning of the statute is, for the foregoing reasons, erroneous (App. 12). In *Hazen, et al. v. National Rifle Association of America*, 69 App. D. C. 339, 101 F. 2d 432, this Court stated as follows:

"What then is the meaning of the term 'engaged in business' as employed in the statute? Webster's Dictionary defines 'business' as 'Any particular occupation or employment habitually engaged in, especially for livelihood or gain.' In its broadest meaning therefore one could be said to be engaged in business if it were his habit to rummage through garbage cans in search of food, after the manner of the human derelicts who may be seen thus employed on the back streets of our large cities. * * *

"* * * As was pointed out in *Lindner Packing & Provision Co. v. Industrial Comm.*, 99 Colo. 143, 60 P. 2d 924, 106 A. L. R. 1498, two meanings have been attributed to the term, one broad and one narrow, and it is necessary to determine in each case which meaning was intended. * * *

If, as the Court indicated in the *Hazen* case, *supra*, that it is necessary to determine in each case whether a broad or narrow meaning was intended to be attributed to the phrase "engaged in business", the question arises as to which meaning is applicable to the definition involved. The Board itself thought so in the prior case. The definition of the words "trade or business" which was involved in the case of *Woodhull v. District of Columbia*, B. T. A. Docket No. 789, 73 W. L. R. 233, is identical to the definition contained in the 1947 Act prior to the 1948 amendment thereto, which amendment, we have seen, is in-

applicable. In the *Woodhull* case the Board stated as follows:

“The language of Section 43 indicates that Congress had in mind a broader, rather than the restricted meaning for the term ‘trade or business.’ Furthermore the enumeration in Section 43(12) of the various meanings of the term ‘trade or business’ is not exclusive. Section 43(12) provides that the words ‘trade or business’ ‘include’ the engaging in or carrying on of the various activities enumerated. In definitive provisions of statutes and other writings, ‘include’ is frequently, if not generally, used as a word of enlargement rather than as one of limitation or enumeration. *American Surety Company v. Marotta*, 287 U. S. 513, 517. Section 43(17) provides that the word ‘include’ when used in a definition shall not be deemed to exclude other things otherwise within the meaning of the term defined.”

For consideration on the question of whether or not the taxpayer was engaged in a trade or business in the District, the District also submits the following cases:

International Shoe Co. v. State of Washington, 326 U. S. 310, 90 L. ed. 95, 66 S. Ct. 154;
Nippert v. Richmond, 327 U. S. 416, 422, 426, 90 L. ed. 760, 66 S. Ct. 586;
Frene v. Louisville Cement Co., 77 U. S. App. D. C. 129, 134 F. 2d 511, 516.

During the tax year involved the taxpayer sold and shipped directly to customers in the District of Columbia from outside the District, \$794,867.12 of merchandise (App. 9). The Assessor used that figure as the numerator in arriving at the proper apportionment factor (App. 11). There is no evidence in the record which proves that that apportionment factor apportioned more income to the Dis-

trict of Columbia than was fairly attributable to any trade or business carried on or engaged in within the District or received from sources within the District (Tr. *passim*). The Board, having concluded that the taxpayer was not engaged in trade or business within the District and hence not liable for tax, made no finding with respect to the propriety of the method of allocation and apportionment used by the Assessor in determining the taxpayer's liability. The taxpayer, however, did claim in its petition that "The Assessor erred in determining that sales made by petitioner in the amount of \$794,867.12, during the calendar year ending December 31, 1948, were fairly attributable to business carried on within the District of Columbia by petitioner" (App. 3). If, then, this Court should reverse the Board and hold that the taxpayer was engaged in a trade or business during the tax year and if the Court should be of opinion that there is insufficient evidence in the record to determine the propriety of the apportionment factor, it would appear that the proper disposition of these appeals would be to reverse the decision of the Board and remand the case to the Board for further proceedings on the question of allocation and apportionment of income. Cf. *Industrial Coverall Laundry Corp. v. District of Columbia*, ____ U. S. App. D. C. ____, 188 F. 2d 669.

CONCLUSION

1. The Board was correct in holding that it was without jurisdiction of the portion of the tax paid under protest subsequent to the deficiency assessment but not before the petition was filed.
2. The Board should be reversed in its holding that it had jurisdiction of the portion of the tax voluntarily paid.
3. The Board was correct in holding that the District's cross-petition for review by this Court was filed timely.
4. The Board should be reversed in holding that the taxpayer was not carrying on or engaged in a trade or busi-

ness within the District and did not have taxable income within the meaning of Title VII, Section 1 of the Act of the District of Columbia Income and Franchise Tax Act of 1947, as amended.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
HARRY L. WALKER,
Assistant Corporation Counsel, D. C.,
WILLIAM S. CHEATHAM,
Assistant Corporation Counsel, D. C.,
Attorneys for District of Columbia,
District Building,
Washington 4, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA *Circuit* *For the*
District of Columbia Court

FILED JAN 23 1953

No. 11137

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*

Joseph W. Stewart
CLERK

v.

DISTRICT OF COLUMBIA, *Respondent*

No. 11145

DISTRICT OF COLUMBIA, *Petitioner*

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent*

PETITION FOR REHEARING OR FOR REMAND TO
THE DISTRICT OF COLUMBIA TAX COURT FOR
FURTHER PROCEEDINGS

JAMES E. CARR
JAMES C. MCKAY
*Attorneys for Owens-Illinois
Glass Company*

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11137

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*

v.

DISTRICT OF COLUMBIA, *Respondent*

No. 11145

DISTRICT OF COLUMBIA, *Petitioner*

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent*

PETITION FOR REHEARING OR FOR REMAND TO
THE DISTRICT OF COLUMBIA TAX COURT FOR
FURTHER PROCEEDINGS

The Owens-Illinois Glass Company, Petitioner in No. 11137 and Respondent in No. 11145, petitions this Court for a rehearing on that part of its decision of January 8, 1953, which held that the Owens-Illinois Glass Company was engaged in business in the District of Columbia in 1948 within the meaning of the District of Columbia Income and Franchise Tax Act

of 1947, as amended, and, hence, that the Company was liable for payment of a corporation franchise tax in 1948. In the alternative, the Owens-Illinois Glass Company petitions this Court for a remand of these cases to the District of Columbia Tax Court for further proceedings.

I

THE CORPORATION WAS NOT ENGAGED IN BUSINESS IN THE DISTRICT OF COLUMBIA IN 1948 WITHIN THE MEANING OF THE DISTRICT OF COLUMBIA INCOME AND FRANCHISE TAX ACT OF 1947, AS AMENDED.

The facts relating to activities of the Owens-Illinois Glass Company in the District of Columbia in 1948 are set forth in the Findings of Fact of the Board of Tax Appeals,* and will not be repeated herein. (See Jt. App., pp. 7-12)

1. THE COMPANY'S SALES IN 1948 FALL WITHIN THE FIRST PART OF THE FIRST PROVISIO OF § 47-1551c OF THE D. C. CODE.

The first question under consideration is whether or not the activities of the Company in the District of Columbia in 1948 were such as to bring it within the first part of the first proviso in §47-1551c, D.C. Code (1951) which states that the words "trade or business" shall not include:

"(1) Sales of tangible personal property whereby title to such property passes within or without the District, by a corporation . . . which does not physically have or maintain an office, warehouse or other place of business within the District, and

* On July 10, 1952, the name of the Board of Tax Appeals for the District of Columbia was changed to the District of Columbia Tax Court.

which has no officer, agent or representative having an office or other place of business in the District, during the taxable year.”

This Court, in its opinion, referred to the definition of “trade or business” in the Act (“engaging in or carrying on of any trade, business, profession, vocation or calling or commercial activity”), and then pointed out that the words “commercial activity” are broader, and go beyond the concept of the words “doing business”, and that:

“ . . . the many cases that deal with the concept of ‘doing business,’ usually in connection with service of process, e.g., *Mueller Brass Co. v. Alexander Milburn Co.*, 80 U.S. App. D.C. 274, 152 F. 2d 142, are therefore not in point” (Advance Sheet, p. 4).

Thereafter, in its opinion, this Court said:

“Because the corporation had an office in the District . . . the first statutory proviso does not apply.” (*Ibid.*)

The Company respectfully points out to the Court that the words “commercial activity” do not appear in the proviso which sets out the kinds of activity which are *excluded* from the definition of the words “trade or business.” The first part of that proviso says that “trade or business” does not mean “sales of tangible personal property,” by a Corporation which does not have an “office” or “*other place of business*” in the District of Columbia. The Company contends this clearly means that the sales of tangible property must be connected with or grow out of the activities of the “office” or “place of business” in order to bring such sales within the definition of the words “trade

or business" in the Act. Cases like *Mueller Brass Co. v. Alexander Milburn Co.*, *supra*, are pertinent to the determination of whether or not the Company had the kind of "place of business" referred to in the first part of the proviso.

Clearly, the Company's sales in the District would not have been subject to the corporation franchise tax if it had no office of any kind within the District. The Company contends that an office in the District, the activities of which are completely unrelated to such sales and which is here only because the District of Columbia is the seat of the Government, is not an "office" or "place of business" within the meaning of the first part of the proviso, and its activities do not take its sales out of the first part of the aforesaid proviso. The Board of Tax Appeals found that:

" . . . the Washington office was not used for the purpose of making sales . . . " (Finding No. 5)

"None of the personnel of the Washington office performed any duties in connection with sale of goods shipped into the District . . . " (Finding No. 4)

These findings were supported by overwhelming evidence, and must be accepted by the Court as conclusive.

Moreover, a typical (Jt. App., p. 64) District of Columbia customer of the Company testified, in part, as follows with respect to the Company's District of Columbia office:

"Q. Did you know the function of that office?

"A. Not precisely, except that it did not have anything to do with our business.

* * * *

"Q. Did you ever call the K Street office here in the District of Columbia for any purpose whatsoever in 1948?

"A. No, sir.

"Q. Did you ever write the K Street office a letter?

"A. No, sir.

"Q. Did you ever telegraph them or communicate with them in any way?

"A. No, sir.

* * * *

"Q. Did anyone in the K Street office ever communicate with you in any way?

"A. No, sir." (Jt. App., p. 30)

The word "office" must be interpreted in the light of its associated words "or *other* place of business." As used in the statute the word "office" means a business office and not an office used to collect information. The office maintained by the Company is not a business office under the decisions of this Court in *Neely v. Philadelphia Inquirer Co.*, 61 App. D.C. 334, 62 F. 2d 873; *Layne v. Tribune Co.*, 63 App. D.C. 213, 71 F. 2d 223; *Fehlhaber Pile Co. v. Tennessee Valley Authority*, 81 U.S. App. D.C. 124, 155 F. 2d 864.

The legislative history of the pertinent statute clearly shows that the proviso in question was added to the statute for the sole purpose of relieving from the District of Columbia franchise tax corporations whose selling procedures in the District are identical with those of the Owens-Illinois Glass Company.

The legislative history of the exemption provisions, added to the Act of 1947 by the Act of May 3, 1948 (S. 2409), shows a clear intent on the part of Congress

to exempt from the words "trade or business", as used in the statute, sales of tangible personal property by traveling salesmen who do not have a residence in the District of Columbia and whose headquarters are located outside the District.

Senate Report No. 1042, 80th Cong., 2nd Sess., dated March 31, 1948, which accompanied S. 2409, stated in part:

"This bill will . . . limit the imposition of an income tax to those concerns factually engaged in business on their own account *or through representatives or agents within the District of Columbia.* (Italics supplied)

Under provisions of the original bills, H.R. 5317 and H.R. 5563, the exemption did not apply unless orders for sale of tangible goods were accepted without the District and title to such property passed without the District. The District tax officials opposed H.R. 5317 in its entirety. If, however, Congress insisted on passing H.R. 5317, the District officials urged that its language be amended to eliminate the tests of passage of title and acceptance of the order outside the District in determining whether a corporation was engaged in business within the District.

Thus, in Hearings before the Joint Subcommittee on Fiscal Affairs of the Committees on the District of Columbia, (held in March and May 1948), at pages 118 and 119, the following discussion is recorded:

"MR. UPDEGRAFF. There is one, Mr. Chairman. In the proposed report, which is contained in the paper I just gave you sir, we stated:

'It is further believed that H.R. 5317, if enacted into law, should contain appropriate

provisions therein with respect to licenses, the definition of what constitutes a trade or business, and the effective date of the act. . . .’

“And we say:

‘It is believed that the language of H.R. 5317 should be materially changed to eliminate insofar as possible the administrative difficulties and the inequities found to exist under the 1939 act as amended.’

“Our proposed bill is attached.

“SENATOR CAIN. Your bill is only for the purpose of resolving those administrative difficulties?

“MR. UPDEGRAFF. Yes, sir.

“SENATOR CAIN. It has nothing whatsoever to do with compromising the rate of tax or the imposition of the tax?

“MR. UPDEGRAFF. That is right, sir. We do not recommend—in other words, we oppose—the amendment. If the Congress desires to amend the 1947 act, in its wisdom, to exempt foreign corporations, we do not believe that 5317 accomplishes it, and we believe it does work inequity. And it is suggested that this language be substituted:

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 1 of title X of article I of an Act approved July 16, 1947, entitled, ‘An Act to provide revenue for the District of Columbia, and for other purposes,’ is amended by striking out the period at the end of the section, inserting a colon, and the following: ‘Provided further, That corporations

which carry on or engage in any trade or business within the District or sell personal property to customers in the District whereby title to such property passes within or without the District shall not be subject to taxation under the provisions of this article unless such corporations maintain a place or places of business within the District, or have an agent, officer, or representative residing or having an office or other place of business in the District during the taxable year.'

* * * *

"SENATOR CAIN. Mr. Updegraff, I am completely a layman. I am not a legalist. So I wish just to make this observation. My understanding of your proposed amendment is that *all out-of-District corporations doing business in the District though (sic) the medium of their sales force, who live here, are in residence within the District, or maintain a branch office of some kind or another, are, if that is the wish of the Congress, to be taxed.*

"MR. UPDEGRAFF. Yes, sir.

"SENATOR CAIN. *That would relieve from taxation those representatives of out-of-town corporations who come in and out of the District on a casual basis, who use the telephone either within or without the District, and so on. That is the distinction you are making, is it not?*

"MR. UPDEGRAFF. Yes, sir; except that I would like to say that *this would not only include those who come here casually, but those who come here continuously and regularly.*

"SENATOR CAIN. But do not live here.

"MR. UPDEGRAFF. But who do not live here *or have a place of business here.*

"REPRESENTATIVE BATES. *You mean they will be exempted?*

"MR. UPDEGRAFF. Yes, sir." (Italics supplied)

Congress, in enacting S.2409, followed the suggestion of the District officials by omitting from the exemption requirements relating to acceptance of orders and passage of title outside of the District of Columbia. More important, however, is the fact that the legislative history of this statute makes it clear that sales of tangible personal property made by salesmen, who live outside the District and who have no business office in the District of Columbia, were to be excluded from the terms "business or trade". The testimony quoted above shows that the District of Columbia had this understanding as to the effect of the amendment.

In view of the foregoing, it must be concluded that the Company was not liable for payment of the tax under consideration because the sales in question were made by salesmen who did not live in the District and who did not have a business office in the District in 1948, but who came into the District, solicited sales from customers and prospective customers, and returned to their headquarters outside the District.

2. THE COMPANY'S SALES IN 1948 FALL WITHIN THE SECOND PART OF THE FIRST PROVISIO OF § 47-1551c OF THE D.C. CODE.

The second part of the first proviso of §47-1551c of the D.C. Code (1951) provides that the words "trade or business" do not include:

"(2) Sales of tangible personal property by a corporation . . . which does not maintain an office

or other place of business in the District and which has no officer, agent, or representative in the District except for the sole purpose of doing business with the United States.”

If the Court takes the view that the activities of the Company's representatives in the District of Columbia office constitute engaging in trade or business, the Company contends that the sole purpose of this office was to do business with the United States, and all of the activities of the Company's representatives in that office were related to doing business with the United States.

Findings Nos. 3 and 8 of the Board of Tax Appeals (Jt. App., pp. 7-9) reveal clearly that all of the activities of the Company's District of Columbia office were concerned solely with agencies of the United States Government. These findings are supported by overwhelming evidence and have not been challenged.

Since the Company's activities in the District of Columbia in 1948 fall within the second part of the first proviso of §47-1551c of the D.C. Code (1951), it was not liable for payment of a corporation franchise tax in 1948.

II

IF THE COURT DENIES THE COMPANY'S PETITION FOR RE-HEARING IT SHOULD REMAND THE CASES TO THE DISTRICT OF COLUMBIA TAX COURT FOR FURTHER PROCEEDINGS.

The Company believes that, if its petition for rehearing is denied, the Court should remand the cases to the District of Columbia Tax Court and direct the Tax Court to determine the amount of tax the com-

pany must pay under the allocation formula contained in Section 10 (2) (d) (1) (a) of the Regulations promulgated by the Commissioners pursuant to the Act. This section provides:

“Where gross income for any taxable year is derived from the manufacture and sale or purchase and sale of tangible personal property, the portion thereof to be apportioned to the District shall be such percentage of the total of such gross income as the District sales made during such taxable year bear to the total sales made everywhere during such taxable year. For the purpose of this regulation the phrase ‘District sales’ shall mean the gross receipts from all sales made which were principally secured, negotiated, or effected by owners, employees, agents, officers and branches of the corporation or unincorporated business located in the District; and the phrase ‘total sales’ shall mean the gross receipts from all sales.”

Assuming the Company was engaged in “trade or business” in the District in 1948, it is liable for payment of a franchise tax only on “District Sales” or sales which were “principally secured, negotiated, or effected by . . . agents [or] officers . . . of the corporation located in the District”. The record clearly shows that the sales of the Company in the District in 1948 were not principally secured, negotiated or effected by any representatives in the Company’s District office. In any event, the Tax Court should be given an opportunity to apportion the 1948 sales of the Company which are subject to the tax in accordance with the facts as it did in *Lever Bros. Co. v. District of Columbia*, C.C.H. D.C. Tax Reporter, para. 14,044 (1951).

The Company believes that the Tax Court should apply the allocation formula, whether or not this Court specifically directs it to do so.* However, the District of Columbia and the Tax Court may take the position that, in view of this Court's opinion, the Tax Court is now obliged to assess the Company with the franchise tax on all of the Company's 1948 sales in the District of Columbia. This position, if taken, would be based on the last two paragraphs of this Court's opinion. The Court said there that the Company asked for the cancellation of the entire tax and did not ask the Board or this Court to decrease the amount of the assessment, and then said:

“So far as the Board directed a refund its decision is reversed. So far as it denied a refund its decision is affirmed.”

The District of Columbia may argue that this Court held that because the Company did not request that the assessment be reduced, the Tax Court now has no power to reduce the assessment.

It is true that the Company asked that the Board cancel the entire tax, but it did so on *two grounds*. First, it contended that the entire tax should be cancelled because the Company was not engaged in business within the District of Columbia within the meaning of the District of Columbia Income and Franchise Tax of 1947, as amended. Secondly, it contended that, if the Company was engaged in trade or business, nevertheless the entire tax should be cancelled because the Company had no “District Sales” in 1948.

* See *Jefferson Standard Life Insurance Co. v. Commissioner*, 33 B.T.A. 404 (1935) as authority for this statement.

Accordingly, the Company contended, there was no basis of apportionment or allocation under Regulation 10 (2) (d) (1) (a).*

The Board of Tax Appeals found at the outset that the Company was not engaged in trade or business, and it was from that ruling that the District of Columbia appealed. The Board never got to the second basis for the Company's contention that the entire assessment should be cancelled. (Jt. App., pp. 12-13) For that reason, the Board did not have to make a finding with respect to the Company's contention that there were no "District Sales", and did not have to make a determination as to whether any of the Company's sales in the District in 1948 were "principally secured, negotiated, or effected" by officers or agents of the Corporation located in the District. Accordingly, there is nothing in the record before this Court which would have permitted the Court to make a finding as to whether the assessment should have been less even if the Company had made an argument along those lines. See *Helvering v. Rankin*, 295 U.S. 123, 131 (1935).

For the foregoing reasons, and in view of the possible ambiguity in the Court's opinion, the Company respectfully requests that this Court give such directions to the District of Columbia Tax Court as will cause it to determine the amount of tax owed by the Company after application of the allocation formula and provisions contained in Section 10 (2) (d)

* The argument was included in the Company's brief to the Board. It is recognized that the Company's brief is not a part of the record before this Court; however, reference is made to it because of this Court's statement that the Company did not ask the Board for a reduction in the assessment.

(1) (a) of the Regulations of the Commissioners promulgated pursuant to the District of Columbia Income and Franchise Tax Act of 1947, as amended.

JAMES E. CARR

JAMES C. MCKAY
*Attorneys for Owens-Illinois
Glass Company*

Certificate of Service

This is to certify that the foregoing Petition was served upon Harry L. Walker, Esq., Assistant Corporation Counsel for the District of Columbia, 14th and E Streets, N.W., Washington, D. C., by mailing a copy thereof in the United States mail, postage prepaid, on the 23rd day of January, 1953.

JAMES C. MCKAY
*Attorney for Owens-Illinois
Glass Company*

ANSWER TO PETITION FOR REHEARING OR FOR
REMAND TO THE DISTRICT OF COLUMBIA TAX
COURT FOR FURTHER PROCEEDINGS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED JAN 30 1953
No. 11137

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*
v.
DISTRICT OF COLUMBIA, *Respondent*. *CLERK*

No. 11145
DISTRICT OF COLUMBIA, *Petitioner*,
v.
OWENS-ILLINOIS GLASS COMPANY, *Respondent*.

Petitions for Review of Decision of the District of
Columbia Tax Court

VERNON E. WEST,
Corporation Counsel, D. C.,
CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
HARRY L. WALKER,
Assistant Corporation Counsel, D. C.,
Attorneys for the District of Columbia,
District Building,
Washington 4, D. C.

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11137

OWENS-ILLINOIS GLASS COMPANY, *Petitioner*,

v.

DISTRICT OF COLUMBIA, *Respondent*.

No. 11145

DISTRICT OF COLUMBIA, *Petitioner*,

v.

OWENS-ILLINOIS GLASS COMPANY, *Respondent*.

**ANSWER TO PETITION FOR REHEARING OR FOR
REMAND TO THE DISTRICT OF COLUMBIA TAX
COURT FOR FURTHER PROCEEDINGS**

The instant petition repeats, in substance, taxpayer's argument contained in point IV of its brief (pp. 24-27) that it was not engaged in any trade or business and had no office or other place of business within the District during the tax year and hence was not subject to tax.

NOTE. ~~The instant petition is not supported by the certificate required by~~
~~Reg. 1.132-1. This Court held in "Estate of E. J. Egan," 11~~
~~11, 182 F. 2d 808, 809, 10-11, 12-13, 14-15, 16-17, 18-19, 20-21, 22-23, 24-25, 26-27, 28-29, 30-31, 32-33, 34-35, 36-37, 38-39, 40-41, 42-43, 44-45, 46-47, 48-49, 50-51, 52-53, 54-55, 56-57, 58-59, 60-61, 62-63, 64-65, 66-67, 68-69, 70-71, 72-73, 74-75, 76-77, 78-79, 80-81, 82-83, 84-85, 86-87, 88-89, 90-91, 92-93, 94-95, 96-97, 98-99, 100-101, 102-103, 104-105, 106-107, 108-109, 110-111, 112-113, 114-115, 116-117, 118-119, 120-121, 122-123, 124-125, 126-127, 128-129, 130-131, 132-133, 134-135, 136-137, 138-139, 140-141, 142-143, 144-145, 146-147, 148-149, 150-151, 152-153, 154-155, 156-157, 158-159, 160-161, 162-163, 164-165, 166-167, 168-169, 170-171, 172-173, 174-175, 176-177, 178-179, 180-181, 182-183, 184-185, 186-187, 188-189, 190-191, 192-193, 194-195, 196-197, 198-199, 200-201, 202-203, 204-205, 206-207, 208-209, 210-211, 212-213, 214-215, 216-217, 218-219, 220-221, 222-223, 224-225, 226-227, 228-229, 230-231, 232-233, 234-235, 236-237, 238-239, 240-241, 242-243, 244-245, 246-247, 248-249, 250-251, 252-253, 254-255, 256-257, 258-259, 260-261, 262-263, 264-265, 266-267, 268-269, 270-271, 272-273, 274-275, 276-277, 278-279, 280-281, 282-283, 284-285, 286-287, 288-289, 290-291, 292-293, 294-295, 296-297, 298-299, 300-301, 302-303, 304-305, 306-307, 308-309, 310-311, 312-313, 314-315, 316-317, 318-319, 320-321, 322-323, 324-325, 326-327, 328-329, 330-331, 332-333, 334-335, 336-337, 338-339, 340-341, 342-343, 344-345, 346-347, 348-349, 350-351, 352-353, 354-355, 356-357, 358-359, 360-361, 362-363, 364-365, 366-367, 368-369, 370-371, 372-373, 374-375, 376-377, 378-379, 380-381, 382-383, 384-385, 386-387, 388-389, 390-391, 392-393, 394-395, 396-397, 398-399, 400-401, 402-403, 404-405, 406-407, 408-409, 410-411, 412-413, 414-415, 416-417, 418-419, 420-421, 422-423, 424-425, 426-427, 428-429, 430-431, 432-433, 434-435, 436-437, 438-439, 440-441, 442-443, 444-445, 446-447, 448-449, 450-451, 452-453, 454-455, 456-457, 458-459, 460-461, 462-463, 464-465, 466-467, 468-469, 470-471, 472-473, 474-475, 476-477, 478-479, 480-481, 482-483, 484-485, 486-487, 488-489, 490-491, 492-493, 494-495, 496-497, 498-499, 500-501, 502-503, 504-505, 506-507, 508-509, 510-511, 512-513, 514-515, 516-517, 518-519, 520-521, 522-523, 524-525, 526-527, 528-529, 530-531, 532-533, 534-535, 536-537, 538-539, 540-541, 542-543, 544-545, 546-547, 548-549, 550-551, 552-553, 554-555, 556-557, 558-559, 560-561, 562-563, 564-565, 566-567, 568-569, 570-571, 572-573, 574-575, 576-577, 578-579, 580-581, 582-583, 584-585, 586-587, 588-589, 590-591, 592-593, 594-595, 596-597, 598-599, 600-601, 602-603, 604-605, 606-607, 608-609, 610-611, 612-613, 614-615, 616-617, 618-619, 620-621, 622-623, 624-625, 626-627, 628-629, 630-631, 632-633, 634-635, 636-637, 638-639, 640-641, 642-643, 644-645, 646-647, 648-649, 650-651, 652-653, 654-655, 656-657, 658-659, 660-661, 662-663, 664-665, 666-667, 668-669, 670-671, 672-673, 674-675, 676-677, 678-679, 680-681, 682-683, 684-685, 686-687, 688-689, 690-691, 692-693, 694-695, 696-697, 698-699, 700-701, 702-703, 704-705, 706-707, 708-709, 710-711, 712-713, 714-715, 716-717, 718-719, 720-721, 722-723, 724-725, 726-727, 728-729, 730-731, 732-733, 734-735, 736-737, 738-739, 740-741, 742-743, 744-745, 746-747, 748-749, 750-751, 752-753, 754-755, 756-757, 758-759, 760-761, 762-763, 764-765, 766-767, 768-769, 770-771, 772-773, 774-775, 776-777, 778-779, 780-781, 782-783, 784-785, 786-787, 788-789, 790-791, 792-793, 794-795, 796-797, 798-799, 800-801, 802-803, 804-805, 806-807, 808-809, 810-811, 812-813, 814-815, 816-817, 818-819, 820-821, 822-823, 824-825, 826-827, 828-829, 830-831, 832-833, 834-835, 836-837, 838-839, 840-841, 842-843, 844-845, 846-847, 848-849, 850-851, 852-853, 854-855, 856-857, 858-859, 860-861, 862-863, 864-865, 866-867, 868-869, 870-871, 872-873, 874-875, 876-877, 878-879, 880-881, 882-883, 884-885, 886-887, 888-889, 890-891, 892-893, 894-895, 896-897, 898-899, 900-901, 902-903, 904-905, 906-907, 908-909, 910-911, 912-913, 914-915, 916-917, 918-919, 920-921, 922-923, 924-925, 926-927, 928-929, 930-931, 932-933, 934-935, 936-937, 938-939, 940-941, 942-943, 944-945, 946-947, 948-949, 950-951, 952-953, 954-955, 956-957, 958-959, 960-961, 962-963, 964-965, 966-967, 968-969, 970-971, 972-973, 974-975, 976-977, 978-979, 980-981, 982-983, 984-985, 986-987, 988-989, 990-991, 992-993, 994-995, 996-997, 998-999, 1000-1001, 1002-1003, 1004-1005, 1006-1007, 1008-1009, 1010-1011, 1012-1013, 1014-1015, 1016-1017, 1018-1019, 1020-1021, 1022-1023, 1024-1025, 1026-1027, 1028-1029, 1030-1031, 1032-1033, 1034-1035, 1036-1037, 1038-1039, 1040-1041, 1042-1043, 1044-1045, 1046-1047, 1048-1049, 1050-1051, 1052-1053, 1054-1055, 1056-1057, 1058-1059, 1060-1061, 1062-1063, 1064-1065, 1066-1067, 1068-1069, 1070-1071, 1072-1073, 1074-1075, 1076-1077, 1078-1079, 1080-1081, 1082-1083, 1084-1085, 1086-1087, 1088-1089, 1090-1091, 1092-1093, 1094-1095, 1096-1097, 1098-1099, 1100-1101, 1102-1103, 1104-1105, 1106-1107, 1108-1109, 1110-1111, 1112-1113, 1114-1115, 1116-1117, 1118-1119, 1120-1121, 1122-1123, 1124-1125, 1126-1127, 1128-1129, 1130-1131, 1132-1133, 1134-1135, 1136-1137, 1138-1139, 1140-1141, 1142-1143, 1144-1145, 1146-1147, 1148-1149, 1150-1151, 1152-1153, 1154-1155, 1156-1157, 1158-1159, 1160-1161, 1162-1163, 1164-1165, 1166-1167, 1168-1169, 1170-1171, 1172-1173, 1174-1175, 1176-1177, 1178-1179, 1180-1181, 1182-1183, 1184-1185, 1186-1187, 1188-1189, 1190-1191, 1192-1193, 1194-1195, 1196-1197, 1198-1199, 1200-1201, 1202-1203, 1204-1205, 1206-1207, 1208-1209, 1210-1211, 1212-1213, 1214-1215, 1216-1217, 1218-1219, 1220-1221, 1222-1223, 1224-1225, 1226-1227, 1228-1229, 1230-1231, 1232-1233, 1234-1235, 1236-1237, 1238-1239, 1240-1241, 1242-1243, 1244-1245, 1246-1247, 1248-1249, 1250-1251, 1252-1253, 1254-1255, 1256-1257, 1258-1259, 1260-1261, 1262-1263, 1264-1265, 1266-1267, 1268-1269, 1270-1271, 1272-1273, 1274-1275, 1276-1277, 1278-1279, 1280-1281, 1282-1283, 1284-1285, 1286-1287, 1288-1289, 1290-1291, 1292-1293, 1294-1295, 1296-1297, 1298-1299, 1300-1301, 1302-1303, 1304-1305, 1306-1307, 1308-1309, 1310-1311, 1312-1313, 1314-1315, 1316-1317, 1318-1319, 1320-1321, 1322-1323, 1324-1325, 1326-1327, 1328-1329, 1330-1331, 1332-1333, 1334-1335, 1336-1337, 1338-1339, 1340-1341, 1342-1343, 1344-1345, 1346-1347, 1348-1349, 1350-1351, 1352-1353, 1354-1355, 1356-1357, 1358-1359, 1360-1361, 1362-1363, 1364-1365, 1366-1367, 1368-1369, 1370-1371, 1372-1373, 1374-1375, 1376-1377, 1378-1379, 1380-1381, 1382-1383, 1384-1385, 1386-1387, 1388-1389, 1390-1391, 1392-1393, 1394-1395, 1396-1397, 1398-1399, 1400-1401, 1402-1403, 1404-1405, 1406-1407, 1408-1409, 1410-1411, 1412-1413, 1414-1415, 1416-1417, 1418-1419, 1420-1421, 1422-1423, 1424-1425, 1426-1427, 1428-1429, 1430-1431, 1432-1433, 1434-1435, 1436-1437, 1438-1439, 1440-1441, 1442-1443, 1444-1445, 1446-1447, 1448-1449, 1450-1451, 1452-1453, 1454-1455, 1456-1457, 1458-1459, 1460-1461, 1462-1463, 1464-1465, 1466-1467, 1468-1469, 1470-1471, 1472-1473, 1474-1475, 1476-1477, 1478-1479, 1480-1481, 1482-1483, 1484-1485, 1486-1487, 1488-1489, 1490-1491, 1492-1493, 1494-1495, 1496-1497, 1498-1499, 1500-1501, 1502-1503, 1504-1505, 1506-1507, 1508-1509, 1510-1511, 1512-1513, 1514-1515, 1516-1517, 1518-1519, 1520-1521, 1522-1523, 1524-1525, 1526-1527, 1528-1529, 1530-1531, 1532-1533, 1534-1535, 1536-1537, 1538-1539, 1540-1541, 1542-1543, 1544-1545, 1546-1547, 1548-1549, 1550-1551, 1552-1553, 1554-1555, 1556-1557, 1558-1559, 1560-1561, 1562-1563, 1564-1565, 1566-1567, 1568-1569, 1570-1571, 1572-1573, 1574-1575, 1576-1577, 1578-1579, 1580-1581, 1582-1583, 1584-1585, 1586-1587, 1588-1589, 1590-1591, 1592-1593, 1594-1595, 1596-1597, 1598-1599, 1600-1601, 1602-1603, 1604-1605, 1606-1607, 1608-1609, 1610-1611, 1612-1613, 1614-1615, 1616-1617, 1618-1619, 1620-1621, 1622-1623, 1624-1625, 1626-1627, 1628-1629, 1630-1631, 1632-1633, 1634-1635, 1636-1637, 1638-1639, 1640-1641, 1642-1643, 1644-1645, 1646-1647, 1648-1649, 1650-1651, 1652-1653, 1654-1655, 1656-1657, 1658-1659, 1660-1661, 1662-1663, 1664-1665, 1666-1667, 1668-1669, 1670-1671, 1672-1673, 1674-1675, 1676-1677, 1678-1679, 1680-1681, 1682-1683, 1684-1685, 1686-1687, 1688-1689, 1690-1691, 1692-1693, 1694-1695, 1696-1697, 1698-1699, 1700-1701, 1702-1703, 1704-1705, 1706-1707, 1708-1709, 1710-1711, 1712-1713, 1714-1715, 1716-1717, 1718-1719, 1720-1721, 1722-1723, 1724-1725, 1726-1727, 1728-1729, 1730-1731, 1732-1733, 1734-1735, 1736-1737, 1738-1739, 1740-1741, 1742-1743, 1744-1745, 1746-1747, 1748-1749, 1750-1751, 1752-1753, 1754-1755, 1756-1757, 1758-1759, 1760-1761, 1762-1763, 1764-1765, 1766-1767, 1768-1769, 1770-1771, 1772-1773, 1774-1775, 1776-1777, 1778-1779, 1780-1781, 1782-1783, 1784-1785, 1786-1787, 1788-1789, 1790-1791, 1792-1793, 1794-1795, 1796-1797, 1798-1799, 1800-1801, 1802-1803, 1804-1805, 1806-1807, 1808-1809, 1810-1811, 1812-1813, 1814-1815, 1816-1817, 1818-1819, 1820-1821, 1822-1823, 1824-1825, 1826-1827, 1828-1829, 1830-1831, 1832-1833, 1834-1835, 1836-1837, 1838-1839, 1840-1841, 1842-1843, 1844-1845, 1846-1847, 1848-1849, 1850-1851, 1852-1853, 1854-1855, 1856-1857, 1858-1859, 1860-1861, 1862-1863, 1864-1865, 1866-1867, 1868-1869, 1870-1871, 1872-1873, 1874-1875, 1876-1877, 1878-1879, 1880-1881, 1882-1883, 1884-1885, 1886-1887, 1888-1889, 1890-1891, 1892-1893, 1894-1895, 1896-1897, 1898-1899, 1900-1901, 1902-1903, 1904-1905, 1906-1907, 1908-1909, 1910-1911, 1912-1913, 1914-1915, 1916-1917, 1918-1919, 1920-1921, 1922-1923, 1924-1925, 1926-1927, 1928-1929, 1930-1931, 1932-1933, 1934-1935, 1936-1937, 1938-1939, 1940-1941, 1942-1943, 1944-1945, 1946-1947, 1948-1949, 1950-1951, 1952-1953, 1954-1955, 1956-1957, 1958-1959, 1960-1961, 1962-1963, 1964-1965, 1966-1967, 1968-1969, 1970-1971, 1972-1973, 1974-1975, 1976-1977, 1978-1979, 1980-1981, 1982-1983, 1984-1985, 1986-1987, 1988-1989, 1990-1991, 1992-1993, 1994-1995, 1996-1997, 1998-1999, 2000-2001, 2002-2003, 2004-2005, 2006-2007, 2008-2009, 2010-2011, 2012-2013, 2014-2015, 2016-2017, 2018-2019, 2020-2021, 2022-2023, 2024-2025, 2026-2027, 2028-2029, 2030-2031, 2032-2033, 2034-2035, 2036-2037, 2038-2039, 2040-2041, 2042-2043, 2044-2045, 2046-2047, 2048-2049, 2050-2051, 2052-2053, 2054-2055, 2056-2057, 2058-2059, 2060-2061, 2062-2063, 2064-2065, 2066-2067, 2068-2069, 2070-2071, 2072-2073, 2074-2075, 2076-2077, 2078-2079, 2080-2081, 2082-2083, 2084-2085, 2086-2087, 2088-2089, 2090-2091, 2092-2093, 2094-2095, 2096-2097, 2098-2099, 2100-2101, 2102-2103, 2104-2105, 2106-2107, 2108-2109, 2110-2111, 2112-2113, 2114-2115, 2116-2117, 2118-2119, 2120-2121, 2122-2123, 2124-2125, 2126-2127, 2128-2129, 2130-2131, 2132-2133, 2134-2135, 2136-2137, 2138-2139, 2140-2141, 2142-2143, 2144-2145, 2146-2147, 2148-2149, 2150-2151, 2152-2153, 2154-2155, 2156-2157, 2158-2159, 2160-2161, 2162-2163, 2164-2165, 2166-2167, 2168-2169, 2170-2171, 2172-2173, 2174-2175, 2176-2177, 2178-2179, 2180-2181, 2182-2183, 2184-2185, 2186-2187, 2188-2189, 2190-2191, 2192-2193, 2194-2195, 2196-2197, 2198-2199, 2200-2201, 2202-2203, 2204-2205, 2206-2207, 2208-2209, 2210-2211, 2212-2213, 2214-2215, 2216-2217, 2218-2219, 2220-2221, 2222-2223, 2224-2225, 2226-2227, 2228-2229, 2230-2231, 2232-2233, 2234-2235, 2236-2237, 2238-2239, 2240-2241, 2242-2243, 2244-2245, 2246-2247, 2248-2249, 2250-2251, 2252-2253, 2254-2255, 2256-2257, 2258-2259, 2260-2261, 2262-2263, 2264-2265, 2266-2267, 2268-2269, 2270-2271, 2272-2273, 2274-2275, 2276-2277, 2278-2279, 2280-2281, 2282-2283, 2284-2285, 2286-2287, 2288-2289, 2290-2291, 2292-2293, 2294-2295, 2296-2297, 2298-2299, 2300-2301, 2302-2303, 2304-2305, 2306-2307, 2308-2309, 2310-2311, 2312-2313, 2314-2315, 2316-2317, 2318-2319, 2320-2321, 2322-2323, 2324-2325, 2326-2327, 2328-2329, 2330-2331, 2332-~~

On page 13 of the instant petition, the taxpayer speaks "of the possible ambiguity in the Court's opinion." There is no ambiguity in the Court's opinion, or, for that matter, in the statute itself.

The words "trade or business" as defined in the statute, do, as this Court observed in its opinion, include "engaging in * * * any * * * commercial activity", as well as engaging in "trade" or "business". In the instant petition, taxpayer has quoted certain colloquy which took place between certain members of Congress and representatives of the District Government in hearings held in March and May 1948. We think the language of the 1948 amendment is plain and unambiguous and therefore resort to what transpired at the hearings is neither permissible nor necessary. The fact is that at those hearings one of the representatives (Mr. Updegraff) pointed out to the Joint Subcommittee exactly the same thing that this Court held in its opinion, viz., extensive solicitation by salesmen is plainly commercial activity and a taxable event. In the course of his testimony before the Subcommittee, Mr. Updegraff testified, *inter alia*, as follows:

"Mr. Updegraff. * * *

"Now, to come down, then, to the question of whether the basis of solicitation of orders is a proper basis upon which to tax the income of a corporation having place of business in the District. The Panitz case clearly established that that is a proper basis. The latest decisions of the Supreme Court of the United States, notably *Nippert v. Richmond* (327 U. S. 416), clearly say that.

"For many years there was a feeling, prior to the case of *International Shoe Company v. State of Washington* (326 U. S. 310), that mere solicitation does not constitute doing business within the jurisdiction. Most of those cases resulted from a question of service of process upon an agent of the foreign corporation.

"But the Court said in that case, in the International Shoe case, that solicitation, when it is regularly sustained and persistent, constitutes business. In that International Shoe Co. case the matter of taxation was involved: Unemployment-compensation taxes of the State of Washington.

"They had been assessed against the corporation, which was a Delaware corporation having its principal place of business in Missouri. And the corporation maintained places of business in several States other than the State of Washington, where the suit arose. The only activity of the corporation in the State of Washington in that case was the use of several salesmen in the area under direct supervision and control of the sales managers located in Missouri.

"In affirming the decision of the Supreme Court of Washington as to the tax, it was pointed out in the United States Supreme Court that the activities carried out by the corporation in the State of Washington were systematic and continuous throughout the years in question and were neither irregular nor casual.

"Senator Cain. I wonder if that is partly an answer, Mr. West, to a question raised by Mr. Bates: That he has been informed that there were no similar tax situations throughout America. But if he was talking about the unincorporated features of a tax, this would not be an answer to that, and I took that to be what he was curious about.

"Mr. West. Yes. They are unquestionably taxed on doing business. But the formulas have been such that probably they do not come to exactly the same formula as we have. Because, as I say, most of those States are manufacturing States, where they base it somewhat on the manufacturing, the work done in the State. So, while the language of many of the statutes is very much similar to that, the practical effect, due to their apportionment features in the statutes, practically changes the situation.

"I think that is correct, is it not, Mr. Updegraff?

"Mr. Updegraff. That is right.

"Now in the case of *Nippert v. Richmond*, there was involved a license tax imposed upon what is known as a drummer. In that case, Nippert was a woman, as I understand the case, who went to the city of Richmond for a period of 5 days and solicited business there without having procured this license. And the ordinance involved levied an annual license tax upon agents, solicitors, corporations, and so forth, engaged in business as solicitors, and the tax was a fixed substantial sum for the first year, to which would be added one-half of 1 percent of gross returns in excess of a thousand dollars for subsequent years.

"The Supreme Court of the United States went into a thorough discussion of the question in that case. It held that in the Nippert case the license tax was not proper. But it was not on the basis of the solicitation question solely. It was because it was a fixed tax, a casual solicitation. They said this:

"In view of the ruling in the International Shoe Company versus Washington (supra) case, we put aside any suggestion that the solicitation when conducted regularly and continuously within the State so as to constitute a course of business may not be "doing business," just as is the making of delivery at any rate for the purpose of focusing a tax which in other respects would be sustainable."

"Now, they went to considerable lengths in the case to make that clear.

"So that clearly the tax imposed by the 1947 act upon the income derived from sources in the District of Columbia, as to corporations and unincorporated businesses, and for the privilege of engaging in a trade or business in the District of Columbia, has firm foundation not only in the decisions of the United States Court of Appeals for the District of Columbia but the Supreme Court of the United States of America."

Thus, at the hearings on the question of amending the 1947 Act, the Subcommittee was fully advised by Mr. Updegraff that solicitation was engaging in business within the meaning of the Act. Yet Congress did not amend the Act by the enactment of H. R. 5317, 80th Congress, 2d Session, which would have provided for the exemption of "income derived from the procurement of orders for the sale of personal property by means of * * * solicitation by salesmen in the District where such orders require acceptance without the District before becoming binding * * * and title to such property passes * * * without the District * * *." This fact makes it clear beyond a doubt that this Court's conclusion that extensive solicitation by salesmen in the District is engaging in trade or business is wholly consistent with the legislative intent. The 1948 amendment contains no such exemption; and, to repeat, the words "trade or business" are defined to include "any * * * commercial activity". Since the taxpayer did not qualify for exemption under the provisos it was clearly liable for tax.

Having reached its opinion that "extensive solicitation by salesmen, in the District, which results in a large volume of sales and shipments to customers in the District, is plainly 'commercial activity in the District'", this Court held that the taxpayer was therefore "engaging in * * * trade or business within the District as the Act defines that term," unless saved by the provisos in the 1948 amendment. This taxpayer did maintain an "office or other place of business in the District" during the tax year and it also had an "officer" and "agent" having an office or other place of business in the District during that year and therefore, as this Court held, the first proviso is inapplicable. The provisions of the second proviso do not apply because, as this Court pointed out, the corporation was engaging in business in the District, and also for the further reason that the District office was not for the sole purpose of doing business with the United States in respect to sales of tangi-

ble personal property since during the tax year, as the manager of the Washington office testified, there were no sales from his company to the United States Government (App. 50).

For the first time, in this petition for rehearing, the taxpayer seeks, as we understand its position, to have this Court direct the lower court to consider the propriety of the apportionment factor used by the Assessor. But, as this Court pointed out, the taxpayer did not ask the Board to decrease the amount of the assessment; it asked for cancellation of the entire assessment and refund of the tax. It did not question the equity of the apportionment or allocation made by the Assessor, nor does the record disclose that it submitted any alternative formula of apportionment to the Assessor as required by Section 10-2(d)(1)c(4),¹ which provides, in so far as pertinent, that

“* * * If it shall appear to any taxpayer that the formulae herein prescribed are inapplicable to its business or will operate so as to apportion to the District a greater portion of the net taxable income of such taxpayer than is fairly attributable to the District, such taxpayer may file with the Assessor a statement of its objections to the use of such formulae together with a proposed alternative method of apportionment. Such statement and proposal shall be supported by whatever evidence the taxpayer deems necessary or the Assessor may request. * * *”

So that not only did the taxpayer fail to suggest any alternative formula of apportionment to the Board, but also failed to supply the same to the Assessor in furtherance of its administrative remedy.² It is true that the District

¹ 1 State and Local Tax Service (CCH)—District of Columbia, ¶13-914, p. 1562.

² It is the taxpayer's duty to propose a method of apportionment if not satisfied with the method used by taxing authorities. *Fleming, et al. v. Oklahoma Tax Com.* (CA 10, 1946), 157 F. 2d 888, 893.

did suggest in its brief (p. 48) that if this Court should hold that the taxpayer was engaged in a trade or business during the tax year, and if this Court should be of opinion that there was insufficient evidence in the record to determine the propriety of the apportionment factor, it would appear that the proper disposition of these appeals would be to reverse the decision of the Board and remand the case to the Tax Court for further proceedings on the question of allocation and apportionment of income. However, upon further consideration of the question, we believe the Court was correct in not considering the propriety of the apportionment formula under the doctrine that issues not raised before the Board will not be considered by this Court.³

For the reasons hereinbefore stated, the District of Columbia urges this Court to deny the instant petition.

Respectfully submitted,

VERNON E. WEST,
Corporation Counsel, D. C.,
 CHESTER H. GRAY,
Principal Assistant Corporation
Counsel, D. C.,
 HARRY L. WALKER,
Assistant Corporation Counsel, D. C.,
Attorneys for District of Columbia,
 District Building,
 Washington 4, D. C.

³ *National Bank of Washington, Guardian v. District of Columbia*, 85 U. S. App. D. C. 187, 176 F. 2d 62; *Eastman Kodak Co. v. District of Columbia*, 76 U. S. App. D. C. 339, 131 F. 2d 347, Footnote 4.